USC Gould
School of Law

Center for Law and Social Science

Rethinking Personal Jurisdiction

(6 *J. of Legal Analysis* 245 (2014))

Daniel Klerman
USC Gould School of Law

Center for Law and Social Science
Research Papers Series No. CLASS14-14

Legal Studies Research Papers Series No. 14-15

August 5, 2014

Electronic copy available at: https://ssrn.com/abstract=2422524

Rethinking Personal Jurisdiction

Daniel Klerman[*]

ABSTRACT

This article sets out a pragmatic justification for the main features of current personal jurisdiction doctrine. According to that justification, personal jurisdiction rules minimize litigation costs and bias. This approach to personal jurisdiction helps resolve difficult and open jurisdictional issues, such as the scope of general jurisdiction and the validity of jurisdiction based on the stream-of-commerce theory. This article then explores the empirical assumptions underlying this pragmatic explanation for current doctrine and shows how doctrine should change if those empirical assumptions were incorrect. For example, the Supreme Court's "purposeful availment" requirement is justified only if the danger of bias against out-of-state litigants is high. If that danger were low, it would make sense to allow plaintiffs to sue in their home states, even if defendants had not purposefully availed themselves of the benefits of that state.

I. INTRODUCTION

Personal jurisdiction law in the United States is generally considered to be in disarray. For over half a century, the Supreme Court has approached personal jurisdiction questions by analyzing the defendant's "minimum contacts" and by asking whether the defendant "purposefully availed" itself of the benefits of the forum. As academic commentators have pointed out, these tests are supported neither by constitutional text nor by history nor by persuasive policy considerations. This article attempts to reorient personal jurisdiction through a thoroughly pragmatic analysis of the consequences of jurisdictional rules. In particular, it argues that personal jurisdiction affects welfare through its effects on litigation costs and by influencing the degree to which the forum is biased. Personal jurisdiction can influence bias in three ways.

[*] Charles L. and Ramona I. Hilliard Professor of Law and History, USC Law School. dklerman@law.usc.edu. www.klerman.com. The author thanks Scott Altman, Seth Aronson, Robert Bone, Lea Brilmayer, Dustin Buehler, Bryant Danner, Christine Desan, Frank Easterbrook, Lee Epstein, Howard Erichson, Jill Fisch, Jonah Gelbach, Jack Goldsmith, James Greiner, Alon Harel, Louis Kaplow, Chimène Keitner, Dean Kitchens, Michael Knoll, Alexandra Lahav, Andrew Lundberg, Martha Minow, Ariel Porat, Richard Posner, Edward Rock, David Rosenberg, Michael Roster, William Rubenstein, Steven Shavell, Henry Weissman, David Wilkins, Lauren Willis, Abby Wood, Stephen Yeazell, and workshop participants at Harvard, Hebrew University, UCLA, University of Virginia, and Yale Law Schools for their comments and suggestions. The author also thanks Steven Green for excellent research assistance.

Electronic copy available at: https://ssrn.com/abstract=2422524

First, rules that give plaintiffs substantial choice of forum encourage some states to develop pro-plaintiff law in order to attract litigation, an effect this article calls "forum selling." Second, in class actions, rules that give plaintiffs choice of forum can lead to a pro-defendant bias in settlement, because they encourage "reverse auctions."[1] Third, rules that require litigation in the plaintiff's or defendant's home state can, under conditions spelled out below, encourage adjudication that is biased against non-residents.

Analysis of jurisdictional issues through the lens of these three effects provides a theory supporting the Supreme Court's two most recent unanimous cases on personal jurisdiction. The danger of forum selling justifies the Supreme Court's narrow interpretation of general jurisdiction in *Daimler* v. *Bauman*.[2] Concerns about bias against non-residents provide support for the Supreme Court's rejection, in *Walden* v. *Fiore*,[3] of jurisdiction based solely on injury to a forum state resident.[4] On the other hand, the pragmatic approach advocated in this article also provides a fulcrum with which to critique the controversial plurality decision in *McIntyre* v. *Nicastro*,[5] which adopted a very narrow interpretation of jurisdiction over manufacturers based on the stream-of-commerce theory.[6]

Well-designed personal jurisdiction rules minimize the sum of plaintiffs' and defendants' litigation costs by selecting a mutually convenient forum. Poorly designed personal jurisdiction rules increase costs. Since litigation costs are real costs, they affect welfare directly. Litigation costs also affect welfare indirectly. For example, high litigation costs may discourage plaintiffs from suing and thus reduce the incentive for defendants to take precautions ex ante. Nevertheless, because the cost of communication and travel has fallen sharply recent decades, the effect of personal jurisdiction on litigation costs may not be significant. Among fora usually considered, litigation costs will usually be lowest when the forum is either the plaintiff's home state or where the defendant is headquartered.[7] In some cases, the location of witnesses or physical evidence may suggest that a forum other than either the plaintiff or defendant's home state would be cost-minimizing.

The effect of personal jurisdiction on bias is more subtle, but potentially more important. Well-designed personal jurisdiction rules give states incentives to design efficient procedural and substantive rules and to create dispute resolutions systems that minimize bias. Conversely, poorly designed personal jurisdiction rules encourage states to choose rules and institutions that transfer wealth from out-of-state litigants to in-state parties.

---

[1] See Section VII below for discussion of reverse auctions.

[2] 134 S. Ct. 746 (2014). See discussion in Section III.B.

[3] 134 S. Ct. 1115 (2014).

[4] See discussion in Section III.F.v.

[5] 131 S. Ct. 2780 (2011).

[6] See discussion in Sections III.F.iii and III.F.v.

[7] For ease of exposition, this article will generally assume that the plaintiff is an individual and that the defendant is a corporation. The analysis would be the same if both parties were individuals, both corporations, or the plaintiff was a corporation and the defendant an individual.

Electronic copy available at: https://ssrn.com/abstract=2422524

Loose jurisdictional rules that allow plaintiffs to choose among many potential courts give judges an incentive to be pro-plaintiff in order to attract litigation. While most judges either have no desire to increase their caseload or feel ethically or ideologically constrained from doing so, a small number of motivated judges can have a national impact. The distortionary effect of a single court is illustrated by the Eastern District of Texas, which has attracted nearly a quarter of all U.S. patent infringements suits in spite of the fact that the district is home to no major cities or technology firms. The Eastern District attracted cases in a myriad of ways, including an interpretation of joinder rules that allowed patent trolls to economize on litigation costs by suing numerous alleged infringers simultaneously. While forum shopping is frequently criticized, the harm it causes has seldom been carefully analyzed. This article suggests that the problem with forum shopping is that it can lead to "forum selling," the creation of excessively pro-plaintiff law by judges who want to hear more cases.

Loose jurisdictional rules can also sometimes lead to a pro-defendant bias. In class actions, plaintiff choice of forum means that competing class actions can be filed in different jurisdictions. Defendants can then conduct a "reverse auction" in order to settle with the plaintiffs' lawyers most willing to negotiate terms favorable to the defendant.

Personal jurisdiction rules can also encourage adjudication that is biased against out-of-state parties. If personal jurisdiction rules meant that the plaintiff always sued where she resided, states would have an incentive to construct pro-plaintiff rules and institutions, because such rules would, on average, redistribute wealth to in-state residents. Conversely, if suit always took place where the defendant was headquartered, states would have an incentive to choose pro-defendant rules and institutions, because such rules and institutions would encourage corporations to locate in-state and thus benefit local residents.

Biases against out-of-staters might be constrained if states had something to lose by being biased. For example, out-of-state corporations are less likely to locate factories in states whose courts are biased in favor of local plaintiffs. A state thus has an incentive to constrain biases in litigation relating to in-state factories owned by out-of-state parties. This paper suggests that the Supreme Court's purposeful availment requirement can be interpreted as restricting jurisdiction to those situations where states have an incentive to constrain their biases. The purposeful availment requirement can thus be seen as a way of reducing bias against out-of-state parties.

From a pragmatic perspective, bias matters primarily because of its effects on the parties' pre-litigation behavior. More specifically, bias affects both the parties' actions (for example, whether a defendant takes efficient precautions to prevent an accident) and the location of the parties' actions (for example, whether a defendant locates a factory in Delaware or California). If courts are biased in favor of a local defendant, then potential defendants may have insufficient incentives to avoid harmful behavior. If courts are biased in favor of plaintiffs, then potential defendants may take excessive care, raise prices, and/or exit the market.

Electronic copy available at: https://ssrn.com/abstract=2422524

The choice of the best jurisdictional rule depends on the relative importance of litigation costs and bias. If jurisdictional rules have a large effect on litigation costs, but a small effect on bias, then it is best to choose jurisdictional rules that minimize litigation costs, such as jurisdiction where the plaintiff resides or the defendant is headquartered. On the other hand, if litigation costs are not much affected by location, but low-cost jurisdictional rules would result in adjudication that was seriously biased in favor of plaintiffs or against out-of-state parties, then it is best to choose jurisdictional rules that help curb bias, such as purposeful availment, even if they increase the cost of litigation. Unfortunately, there is very little empirical research on the effect of jurisdictional rules on either litigation costs or bias. It is hoped that his article will spark such investigations.

This article will focus its analysis on five possible personal jurisdiction rules:

1) **Plaintiff choice**. Plaintiff can choose to sue in any state.

2) **Plaintiff's residence**. Plaintiff can sue only in the state where she is resident.

3) **Defendant's headquarters**. Plaintiff can sue only in the state where the defendant is headquartered.

4) **Purposeful availment**. Plaintiff can sue a defendant in a state, only if the defendant has purposefully availed itself of that state. This article will consider purposeful availment both as construed by the U.S. Supreme Court and a modified version that takes into account the pragmatic considerations discussed in this article.

5) **Lowest cost**. Plaintiff can only sue in the state in which litigation costs are likely to be the lowest.

Although only purposeful availment tracks existing U.S. law, consideration of this broader range of potential rules helps illuminate the policy considerations relevant to the design of welfare-enhancing jurisdictional rules.

The analysis of personal jurisdiction in terms of litigation costs and bias is an application of Posner's approach to the economic analysis of procedure. That approach argues that procedure should aim to minimize the sum of direct costs and error costs.[8] Direct costs are litigation costs. Bias is a form of error cost, because it involves a deviation from accurate application of substantive law. Jurisdiction might affect error costs in ways other than bias. For example, as discussed below in Section VII, one reason that the best jurisdictional rule might allocate corporate governance disputes relating to Delaware corporations to Delaware state courts is that those courts have the most expertise in interpreting Delaware law, and thus are most likely to apply it accurately. Nevertheless, because the main way that jurisdiction affects

[8] Richard Posner, *An Economic Approach to Legal Procedure and Administration*, 2 J. LEGAL STUD. 399 (1973).

Electronic copy available at: https://ssrn.com/abstract=2422524

accuracy is through its effect on bias, this article will focus on bias rather than other aspects of error costs. Prior economic analyses of jurisdiction have focused exclusively litigation costs (direct costs). The main contribution of this article is its focus on bias (error costs).[9]

Personal jurisdiction is not a major issue in contract cases. The ability of parties to write enforceable choice-of-forum clauses means that personal jurisdiction law is just a default rule. If personal jurisdiction law is reasonably efficient, then parties might not include forum selection clauses in their contracts and, instead, might simply rely on the rules provided by the state and federal law. This probably explains the fact that there is currently a non-trivial amount of jurisdictional litigation in contract cases. On the other hand, in tort cases, the parties cannot usually contract beforehand, and personal jurisdiction can have a significant impact. Some torts, such as medical malpractice, products liability, and employment discrimination, arise out of contractual relationships, and parties can probably include forum-selection clauses in their contracts that would govern related torts. Under standard assumptions, the ability of parties to contract ex ante for the forum should lead to efficiency. On the other hand, when there are significant informational asymmetries or other transactions costs, there is reason to doubt the efficiency of such clauses.[10]

Part II of this Article examines the effect of jurisdiction on litigation costs. Part III analyzes the impact of jurisdiction on court bias. Part IV explores the relationship between federal diversity jurisdiction and personal jurisdiction in state court. Part V discusses personal jurisdiction in federal court. Part VI analyzes international aspects of personal jurisdiction. Part VII discusses multi-party litigation, including class actions and reverse auctions. Part VIII explores sovereignty and fairness arguments. Section IX analyzes jurisdictional rules that involve randomization, and Part X concludes.

II. LITIGATION COSTS

Litigation costs are the focus of much academic commentary about personal jurisdiction. Most recently, Geoffrey Miller has written two articles arguing that personal jurisdiction rules should be designed to select the least-cost forum.[11] Litigation costs are also a major, but not the

[9] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 904 (8th ed. 2011); Geoffrey Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction* (NYU Public Law & Legal Theory Research Working Paper No. 13-12, March 2013); Geoffrey Miller, *A New Procedure for State Court Personal Jurisdiction* (NYU Public Law & Legal Theory Research Working Paper April 2013).

[10] *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551 (2012).

[11] Geoffrey Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction* (NYU Public Law & Legal Theory Research Working Paper No. 13-12, March 2013); Geoffrey Miller, *A New Procedure for State Court Personal Jurisdiction* (NYU Public Law & Legal Theory Research Working Paper April 2013).

Electronic copy available at: https://ssrn.com/abstract=2422524

exclusive concern, of the Supreme Court in its personal jurisdiction jurisprudence. Nevertheless, this section argues that the impact of the forum on litigation costs has been exaggerated and therefore that litigation costs may be of secondary importance when designing optimal personal jurisdictional rules.

A. Is it significantly more expensive to litigate out of state?

While it is intuitive to assume that it is significantly more expensive for a party to litigate out-of-state, this assumption is not well-founded. There are no empirical studies documenting increased costs for out-of-state litigants, and conversations with lawyers suggest that, in most situations, distance has little or no impact on litigation costs. One lawyer the author consulted described the idea that distance increased litigation costs as "quaint." When asked to quantify the cost difference between litigating in state and out-of-state, most lawyers the author queried answered "less than two percent."

Consider, for example, a tort defendant sued where the plaintiff resides, but far from the defendant's headquarters. Nearly all tort defendants are represented by insurance companies, and most insurance companies have well-established networks of lawyers across the country. In a typical case, the insurer's central or regional office selects and supervises a lawyer who practices in the forum. Because the insurance company has long-term relationships with most of these lawyers, the lawyers are already familiar with the insurance company's policies and procedures. Nearly all documents these days are electronic, so physical proximity to files is largely irrelevant. As a result, litigating where the plaintiff resides is not likely to be more expensive for the defendant or its insurance company.

If the insured, the plaintiff, or witnesses are not located in the same city as the insurance company lawyer, the lawyer may have to travel for meetings and depositions. On the other hand, if the insured, the plaintiff and witnesses are in different locations, no jurisdictional rule could eliminate the need for such travel. Since the lawyer is likely to have more contact with her client (the insured) than with the opposing party or other witnesses, defense costs might be lower if the lawyer were in the same city as the insured. Nevertheless, since most communication these days is done by phone, email, or conference call, whether the lawyer and the client are in the same city is unlikely to significantly affect total litigation costs. In addition, the cost of travel, especially air travel, has dropped significantly in recent decades, while the cost of lawyer's time has increased, so the cost of travel is generally insignificant compared to lawyers' fees. Perhaps most importantly, even if it is more expensive for defense counsel to communicate with her client if litigation takes place in the plaintiff's home state, litigating in the defendant's home state would impose similarly increased communication costs on the plaintiff and plaintiff's lawyer. As a result, it is implausible to think that overall litigation costs would ordinarily be significantly lower if litigation took place somewhere other than the plaintiff's home state.

Electronic copy available at: https://ssrn.com/abstract=2422524

Similarly, consider a suit brought in California by a Californian employed in a Los Angeles factory owned by a corporation headquartered in Delaware. Like the insurance company in the previous example, the Delaware company is likely to have an established relationship with a law firm in Los Angeles. The firm's general counsel's office will likely incur costs supervising the Los Angeles lawyers, but they would likely have incurred similar costs supervising an employment law firm in Delaware, if the suit had been there. The plaintiff, the plaintiff's supervisor, and other relevant actors and witnesses are likely to be in Los Angeles, so there is no reason to think that litigation in Los Angeles would be more expensive than in Delaware. In fact, it would probably be cheaper.

The previous two situations– insured defendant and corporation that does business routinely across the country – assumed that the defendant or its insurance company had a well-established network of lawyers that included lawyers in the relevant forum. Of course, whether insurance companies or corporations establish such networks depends on the jurisdictional rule. If the rule were that defendants could only be sued in their headquarters' state or in their insurer's state, then it might not be necessary to set up such networks. Defendants and insurance companies could hire just one set of lawyers in their home state. This centralization of litigation might result in cost savings. On the other hand, it seems unlikely that the savings would be significant for several reasons. First, over time, the same entity is likely to be both plaintiff and defendant. So a rule that required all litigation to be in the defendant's state wouldn't centralize all litigation in a party's state, because when suing an out-of-state party, the entity would still need to hire out-of-state lawyers. In addition, a rule that made the forum dependent on where the defendant was headquartered would, as discussed in section III, encourage pro-defendant laws. Similarly, a rule that made the forum dependent on where the insurer was located would cause parties to select insurance companies in the most defendant-friendly jurisdiction. As discussed further in section III, this would give states incentives to be inefficiently pro-defendant so as to encourage insurance companies to locate in-state.

Finally, consider a California individual who hires a lawyer on contingent fee to litigate a suit against a Delaware defendant in Delaware state court relating to a slip and fall in Delaware. She is likely to hire a Delaware lawyer. Since individual plaintiffs are not likely to have preexisting relationships with lawyers, there is no reason to involve a California lawyer and thus to incur the added expense of two sets of counsel. The Delaware lawyer is likely to communicate with the client by phone, so there is little reason for the plaintiff or plaintiff's lawyer to travel. Depositions usually occur where the deponent is located, but a plaintiff is often required to travel to the forum to be deposed. This suggests that suit in Delaware would increase the cost of the plaintiff's deposition, because the plaintiff will probably have to travel to Delaware, whereas if suit had been in California and both parties hired California lawyers, no one would have had to travel. Nevertheless, the cost of flying an individual from California to Delaware and two nights hotel is likely to be around $1000, which is trivial in most litigation. On the other hand, suit in Delaware has offsetting advantages. The witnesses to the slip and fall are

Electronic copy available at: https://ssrn.com/abstract=2422524

probably in Delaware, so no one will have to travel to depose them. So, suit in Delaware makes the deposition of witnesses cheaper but the deposition of the plaintiff more expensive, while suit in California makes the deposition of the plaintiff cheaper, but the deposition of witnesses more expensive. So, again, there is no reason to think that one forum or another is likely to have a significant effect on total litigation costs. A sign of the relative insignificance of location is that contingency fee contracts seldom increase the lawyer's percentage when the client is out of state.[12] While some travel costs, such as airfare and hotel, can be billed separately to the client, any additional time the lawyer would have to spend on account of the distance between client and forum would be part of the contingent fee itself. In addition, even airfare and hotel costs are ordinarily collected only if the plaintiff prevails. Thus, the fact that the contingency fee does not ordinarily vary is a good sign that distance does not significantly increase the time or money a contingency fee lawyer puts into a case.

Nevertheless, there certainly are circumstances in which out-of-state litigation could be significantly more expensive. For example, a medium-sized company that infrequently litigates out-of-state is likely to incur significantly higher litigation costs when litigating out of state. Such a company is likely to have an established relationship with a nearby lawyer, but not with lawyers in the forum state. As a result, the firm is likely to want the lawyer it knows to supervise the litigation, but it will also need to hire lawyers in the forum state. Because the lawyers in the forum state will not already be familiar with the client and its business, the company will have to pay those lawyers to spend time informing themselves. If the litigation had been nearby, the company would probably have had its usual lawyers handle the case, thus eliminating both the need to pay one lawyer to supervise another and the need for the new lawyer (or lawyers) to spend time informing themselves about the company. Some lawyers I consulted estimated that the extra cost of litigation in this circumstance could easily be twenty percent of the total cost.

Another situation in which out-of-state litigation could be more expensive is where the matter is so important that the defendant prefers counsel based near its headquarters that it knows and trusts, even though the forum is elsewhere. In those situations, even though the corporation may have relationships with law firms in the forum state, the corporation may incur the additional expense of entrusting lawyers in its headquarters state to run the litigation. Nevertheless, the additional cost in this circumstance may still not be significant. As one lawyer put it, "If I am being paid $900 an hour, the cost of airfare and hotel is trivial." Another Los Angeles lawyer told me that one client who hired him to litigate a case in the New York area told him, "bill me like a New York lawyer," by which the client meant, don't bill me for your travel expenses. The lawyer readily agreed, because, in comparison to his hourly fee, his travel expenses were insignificant. Although in such situations lawyers' fees may not increase significantly, the extra cost of senior executive time may be significant in out-of-state litigation,

[12] I have heard of only one instance in which contingency lawyers charged more to out-of-state plaintiffs—a law firm specializing in personal injury cases against Disney World. The contingency percentage when up two or three percent.

Electronic copy available at: https://ssrn.com/abstract=2422524

especially if senior executives need to be present at trial. On the other hand, most cases settle or are resolved by pre-trial motion, so such costs will be necessary in only a small percentage of cases.

In sum, in a wide variety of circumstances, the forum is unlikely to significantly affect overall litigation costs. When defendants are represented by insurance companies, the insurance company is likely to have well-established relationships with local counsel which make litigating out of state little different than litigating where the insurer or insured is headquartered. Corporations that routinely do business in many states are similarly likely to have established networks of lawyers in many states, so being sued out-of-state is unlikely to significantly increase their costs. Similarly, contingent fee lawyer expenses are unlikely to be higher when litigating out of state, because communication is cheap. In addition, individual plaintiffs are unlikely to have preexisting relationships with lawyers, so they are unlikely to hire both lawyers near home and lawyers in the forum state. Only when a medium-sized firm litigates out of state and incurs the cost of both in-state and out-of-state counsel is out-of-state litigation likely to be significantly more expensive.

B. Asymmetric effects of distance on litigation costs

Even when out-of-state litigation costs are higher, personal jurisdiction rules may be relatively powerless to reduce overall costs. Consider, for example, a medium-sized California firm that sues a medium-sized Delaware firm. Total litigation costs – plaintiff's litigation costs plus defendant's litigation costs – are likely to be similar whether the case is litigated in California or Delaware. If the case is litigated in Delaware, then the California plaintiff is likely to incur higher litigation costs. If the case is litigated in California, then the Delaware defendant is likely to incur higher litigation costs. Nevertheless, total litigation costs are likely to be roughly equal in the two jurisdictions.

Personal jurisdiction rules might significantly affect litigation costs where distance has different effects on plaintiff and defendant. For example, suppose an individual California plaintiff is suing a medium-sized Delaware defendant that does not litigate often in California. As noted above, the California plaintiff's litigation costs are unlikely to be significantly higher if the case is in Delaware, but the Delaware defendant's litigation costs may be much higher if the case is heard in California. In this situation, requiring suit in Delaware would reduce litigation costs.

Thus, even if litigation costs increase with distance to the forum, the forum may still not have a significant effect on total litigation costs, if the plaintiff's and defendant's litigation costs are affected by distance in similar ways. In this situation, choosing one forum or another would shift costs from one party to another without affecting total litigation costs. On the other hand, if the parties litigation cost functions are different – for example if the plaintiff's costs do not go up

Electronic copy available at: https://ssrn.com/abstract=2422524

much with distance but the defendant's costs do – then it would minimize litigation costs to require litigation in the state of the party whose costs vary more with distance.

C. LITIGATION COSTS AND STATE LINES

Although personal jurisdiction rules have the potential to reduce litigation costs, they may not be the best tool to do so. Personal jurisdiction determines what state a lawsuit may be brought in. It thus attaches central importance to state lines. Litigation costs, however, may be more closely related to distance and transportation networks. For example, it might be much cheaper for a New York City party to litigate in northern New Jersey than in upstate New York. Similarly, a lawyer based in Los Angeles told me it was cheaper for him to litigate in Las Vegas than in San Diego, because it was cheaper and easier to fly to Las Vegas than to drive to San Diego. If forum really matters for litigation costs, it would make sense to craft rules that take into account these factors rather than to focus on states and state boundaries. Of course, venue rules take into account these factors, but, if the case is in state court, they can only determine where within a state the case should be heard. They cannot determine which state court should hear a case. Even in federal court, except when there is a special jurisdictional statute, venue rules only select a federal court district located within a state that would have jurisdiction.

D. THE NUMBER OF SUITS

So far, this section has focused on litigation costs on the assumption that there is litigation. Personal jurisdictional rules may also influence the amount of litigation and in that way affect total litigation costs. The ways that personal jurisdiction rules affect the number of suits will be discussed below. For example, personal jurisdiction rules that increase the plaintiff's litigation costs or that require litigation in fora that restrict contingent fees may reduce the amount of litigation. On the other hand, loose pleading rules and rules that make summary judgment difficult may encourage plaintiffs to bring weak cases in the hope of a favorable jury or in order to extract a settlement. In general, the welfare effects of the increase or decrease in litigation depends primarily on whether the suits that are encouraged or discouraged are meritorious, not on whether doing so increases or decreases overall litigation costs. That is, more or less litigation is not, in and of itself, a good thing. Instead, personal jurisdiction rules that discourage meritorious litigation or encourage weak cases are bad, while rules that encourage strong cases while discouraging frivolous ones are good, regardless of whether doing so increases or decreases total litigation costs. As a result, the effect of jurisdictional rules on the number of suits is best analyzed through their effect on bias, because courts which are biased in favor of the plaintiff encourage frivolous cases, while those that are more neutral encourage meritorious cases. The effect of personal jurisdiction on bias is discussed in section III.

E. THE COST OF LITIGATING JURISDICTION

So far this section has focused on the costs of litigating the merits and other non-jurisdictional issues. As Dustin Buehler has pointed out, the jurisdictional rule can also affect

Electronic copy available at: https://ssrn.com/abstract=2422524

the probability of a dispute over jurisdiction and the costs of such jurisdictional disputes.[13] Some jurisdictional rules – such as unfettered plaintiff's choice or suit in the plaintiff's or defendant's home state – are relatively clear and are likely to minimize disputes over jurisdiction. Other rules – such as purposeful availment– are likely to generate more disputes. The lowest cost jurisdictional rule, which allows plaintiff to sue only where litigation costs are likely to be lowest, is particularly likely to engender expensive litigation about the jurisdiction, because it is difficult to predict litigation costs, especially one's opponent's litigation costs, at the beginning of a suit.

An open question is how expensive it would be to implement a rule that required litigation to be in the lowest-cost forum. Because it can be difficult to predict litigation costs at the beginning of litigation, one suspects that such a rule would give rise to disputes in a significant number of cases. If so, the cost of determining the lowest-cost forum could more than offset the savings eventually litigating there would engender. A recent paper by Geoffrey Miller proposes that in cases in which there is minimal diversity, a defendant sued in state court should be allowed to remove the case to federal court, and the federal court would then determine which court, federal or state, would be the lowest-cost forum.[14] This proposal has the potential to greatly increase the cost of litigating jurisdiction. For example, a plaintiff might sue in Massachusetts state court. A defendant who believed that California courts would reduce litigation costs, would then remove the case to the federal district court in Massachusetts. A Massachusetts federal judge would then hold a hearing to determine whether Massachusetts state court, California state court, Massachusetts federal court, or some other court, would result in the lowest cost resolution of the case. If the federal court determined that the defendant was correct that a California state court was the cheapest, the case would be dismissed, and the plaintiff would have to refile in California, a process that would likely require hiring completely new counsel and redrafting of the complaint. Or the plaintiff could immediately appeal the federal district court decision remanding the case to a federal appellate court, thereby prolonging the jurisdictional conflict.[15] Geoffrey Miller correctly points out that, if plaintiffs and defendants can accurately predict which forum a federal district court would determine to be cheapest, the plaintiff will chose that forum at the outset and defendant would not challenge jurisdiction. Nevertheless, given the open-ended nature of the inquiry, one suspects that plaintiff and defendant will frequently disagree in their predictions about what court a federal judge would find cheapest. As a result, it seems likely that the procedure envisioned by Geoffrey Miller would select the lowest cost forum only at such a great cost that total litigation costs, which include the cost of litigating jurisdiction, would increase.

[13] Dustin Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105 (2012).

[14] Geoffrey Miller, *A New Procedure for State Court Personal Jurisdiction* (NYU Public Law & Legal Theory Research Working Paper April 2013).

[15] Id at _.

Electronic copy available at: https://ssrn.com/abstract=2422524

The cost of determining the lowest-cost forum could be reduced if deference were given to the plaintiff's initial choice. For example, the defendant might have the burden of proving that some other forum was more convenient, perhaps by clear and convincing evidence. While such a rule would reduce litigation costs, it would give the plaintiff substantial forum choice, thus creating the forum selling danger discussed below.

F. INDIRECT EFFECT OF LITIGATION COSTS

High litigation costs may make it too costly for plaintiffs to bring meritorious lawsuits. This, in turn, may reduce potential defendants' incentives to comply with the law. While plaintiffs in the U.S. generally hire contingent fee lawyers, whether a contingent fee lawyer is willing to take the case depends on the likely damages, the probability of prevailing, and on litigation costs. Higher litigation costs may therefore deter contingent fee lawyers from taking meritorious cases. Nevertheless, given the discussion above, it seems unlikely that the cost of suing on behalf of an out-of-state plaintiff will have a significant influence on the number of cases contingent fee lawyers are likely to take. On the other hand, as discussed below, if the relevant forum is outside the United States, high litigation costs could deter meritorious suits, because contingent fees are often illegal.

High litigation costs could, theoretically, make it too expensive for a defendant to defend. For example, if personal jurisdiction rules allowed the plaintiff to choose a forum that was very inconvenient for the defendant, the defendant might choose to allow default judgment to be entered against it rather than to litigate the case. For defendants with sufficient assets to be worth suing, such a scenario seems highly unlikely.

G. LITIGATION COSTS AND CONTRACT DISPUTES

If parties are rational and transactions costs are low, they should be able to negotiate forum selection clauses that minimize the sum of their litigation costs. Thus, personal jurisdiction law should not have a major impact on litigation costs in contract cases. If personal jurisdiction law selected an expensive forum, one would expect rational parties to contractually choose a different forum.

H.SUMMARY

The forgoing analysis suggests that jurisdiction in the plaintiff's residence or defendant's headquarters state are likely to result in the lowest litigation costs.

1) **Plaintiff choice**. Allowing the plaintiff to sue in the state of her choice is likely to result in the highest litigation costs. Although, all other things being equal, a plaintiff is likely to prefer a forum with low litigation costs, plaintiffs have an even stronger preference for fora with pro-plaintiff rules and institutions. Since the forum with the

Electronic copy available at: https://ssrn.com/abstract=2422524

most pro-plaintiff rules and institutions may be neither the plaintiff's nor the defendant's home state, allowing the plaintiff to sue in any state may result in high litigation costs.

2) **Plaintiff's residence**. Requiring all suits to be in the state where the plaintiff resides is a plausible litigation-cost minimizing rule. It would minimize the plaintiff's lawyer's travel costs. On the other hand, under the assumption that the defendant is from out of state, it would increase the defendant's litigation costs.

3) **Defendant's headquarters**. Like suit in the state where the plaintiff resides, suit in the state where the defendant is headquartered is likely to result in low overall litigation costs. It reduces travel expense for the defendant, but increases it for the plaintiff.

4) **Purposeful availment**. Purposeful availment will be discussed in greater detail in the next section. Usually, purposeful availment will result in litigation either in the state where plaintiff resides or in the state where defendant is headquartered. Nevertheless, it will, at least sometimes, result in litigation in other fora. In addition, this rule is more ambiguous and therefore likely to generate more litigation about jurisdiction. As a result, it is likely to result in litigation costs greater than plaintiff's residence or defendant's headquarters.

5) **Lowest cost**. Having litigation take place in the lowest cost forum could decrease litigation costs once the forum is selected, but might also lead to expensive disputes about what forum would be cheapest.

III. BIAS

While discussions of personal jurisdiction commonly take into account effects on litigation costs, one of the contributions of this article is to analyze the effects of personal jurisdiction on forum bias. Most of this section will analyze the effect of jurisdiction on bias under the assumption that state legislators, judges, and jurors act to maximize the interests of in-state residents. This assumption has some plausibility and has relatively clear implications for jurisdictional rules. On the other hand, a more realistic analysis would take into account the relative political power of particular groups – for example, consumers, trial lawyers, doctors, and businesses. The implications of such an analysis are much murkier and will be discussed at the end of this section.

There are two principal biases that personal jurisdiction can influence: the pro-plaintiff bias and the pro-resident bias. Personal jurisdiction rules that give plaintiffs substantial choice of forum encourage pro-plaintiff bias. Personal jurisdiction rules that select the plaintiff or defendant's residence as the forum may lead to a bias in favor of in-state residents (that is, in

Electronic copy available at: https://ssrn.com/abstract=2422524

favor of residents of the forum state), unless tempered by doctrines, such as purposeful availment, that give the forum a reason to adjudicate fairly.

A. BIAS AND CONTRACT LITIGATION

Analysis in this section will focus on tort cases. When the parties are in a contractual relationship, they can ordinarily use forum-selection clauses to choose a forum that is mutually beneficial. On the other hand, as noted in the Introduction, there are reasons to doubt that contractual choice of forum will be efficient in many consumer contexts. Consumers rationally don't read the fine print in most form contracts, and, as a result, sellers have little incentive to draft efficient terms. In addition, asymmetric information may give sellers an incentive to choose inefficient fora.[16] Similar arguments would apply to other consumer contracts in fields such as insurance, employment, or banking.

B. FORUM SELLING AND THE PRO-PLAINTIFF BIAS

Substantial plaintiff choice of forum can lead to a pro-plaintiff bias in two ways. First, the plaintiff's lawyer is likely to choose the forum with the most pro-plaintiff laws, procedures, and institutions. Second, the fact that plaintiffs choose the most favorable forum may give some courts an incentive to make their laws, procedures and institutions especially favorable to plaintiffs in order to attract more cases.

If more than one court would have jurisdiction, the plaintiff's lawyer will choose the forum that, all things considered, will give his or her client the highest expected recovery. This phenomenon is, of course, colloquially known as "forum shopping." While litigation costs are one factor, applicable law and the reputation of the forum as pro-plaintiff or pro-defendant will usually be more important, especially in larger cases. The ability of the plaintiff to choose the court with the most favorable laws and institutions could itself be seen as introducing a pro-plaintiff bias. The matter, however, is somewhat more complicated, because whether there is a pro-plaintiff bias depends on the distribution biases among possible fora. Suppose, for example, that all states and courts were trying to make their laws and institutions fair and efficient, but did so with random errors such that equal numbers were biased in a pro-defendant direction and in a pro-defendant direction. Under these assumptions, allowing the plaintiff to choose the most pro-plaintiff court would result in application of laws, procedures and institutions that were unfairly and inefficiently pro-plaintiff. On the other hand, perhaps because of lobbying by pro-business groups, it is possible that the average court is biased in a pro-defendant direction, with some courts more pro-defendant than average and others unbiased. Under these assumptions, allowing the plaintiff to choose the most pro-plaintiff court would result in an unbiased forum. Nevertheless, as discussed below, there is reason to believe if plaintiffs have substantial choice of forum that at least some courts will compete for litigation by making their laws, procedures

[16] *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551 (2012).

Electronic copy available at: https://ssrn.com/abstract=2422524

and institutions pro-plaintiff. If that is correct, plaintiff choice of forum will lead to a substantial pro-plaintiff bias.

In his 1992 article on choice of law and product liability, Bruce Hay gave a vivid illustration of the way that personal jurisdiction rules could lead to competition and an undeniable pro-plaintiff bias.[17] Suppose plaintiffs had unfettered choice of forum. A plaintiff would, obviously, choose to sue in the state which it thought would provide the highest expected recovery net of litigation costs. Anticipating such behavior, an enterprising state, perhaps Nevada or Delaware, might decide to attract as much litigation as possible. A state might do so because of the business that litigation brought to in-state lawyers, hotels, and restaurants. To offset additional court costs, it might raise its court fees so that the courts at least broke even. Or it might raise court fees so that courts made a profit for the state.

In order to attract litigation, the state would have to make its courts attractive to plaintiffs, because plaintiffs choose the forum. Some ways of making courts more attractive – such as reducing delay -- would improve the quality of law. Others, however, could have significant deleterious effects. For example, plaintiffs generally prefer loose pleading rules that allow them to get to discovery, even if their case is weak. Similarly, plaintiffs generally prefer strict summary judgment standards, which allow them to bring weak cases to trial. More drastically, Nevada or Delaware judges could give jury instructions that encouraged higher damages and more frequent imposition of punitive damages. State judges and litigators might also choose choice-of-law doctrines that favored local law and alter local law in ways that were pro-plaintiff, such as creating new causes of action, preferring strict liability over negligence, and allowing controversial kinds of damages, such as loss of chance and emotional distress. As discussed below, other legal rules, such as the Due Process Clause, might constrain the ability of Nevada or Delaware to make their courts absurdly pro-plaintiff, but such constraints are likely to be weak and to prevent only the most blatant pro-plaintiff biases.

Although it is implausible that all, or even most states, would compete for litigation, loose jurisdictional rules can have negative effects even if most states decline to compete. Even if only one state made its laws significantly pro-plaintiff, that could have an important national effect, because that state might attract significant amounts of out-of-state litigation. In addition, if one state were successful in generating local economic activity and fees from encouraging litigation, other states would likely imitate it, thus exacerbating the problem.

The jurisdictional competition sketched in the prior paragraph has some similarities to the competition for corporate chartering which has enabled one state, Delaware, to have a disproportionate influence on corporate law. Distinguished scholars have argued that, since those who choose where to incorporate have incentives to maximize shareholder value, competition among states for corporate chartering leads to efficient corporate law. Nevertheless,

[17] Bruce Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L. J. 618 (1992).

Electronic copy available at: https://ssrn.com/abstract=2422524

there is no similar pressure for efficiency in the market for non-contractual dispute resolution. Since the plaintiff chooses the forum, its incentive is to choose the forum that maximizes its recovery, not the forum that efficiently applies efficient rules. Of course, in contractual relationships, the parties would have substantial incentives to choose an efficient forum ex ante through forum selection clauses. Nevertheless, in tort and other non-contractual suits, no similar incentive exists.

This analysis of jurisdictional competition provides an explanation of why forum shopping is so bad. The problem is not just that the plaintiff can choose the most favorable forum, but that plaintiffs' ability to do so gives states an incentive to make inefficient law. Thus, the real problem with forum shopping is that it could lead to forum selling.

While such jurisdictional competition might seem far-fetched, there are several instances where it has occurred. Venue rules for patent litigation mean that a patentee alleging infringement by a nationally distributed product can sue in any federal district. In response, judges in the Eastern District of Texas have formulated local rules and practices that have enabled them to attract nearly a quarter of all patent litigation in the US, even though the Eastern District is home to no major cities or technology firms.[18] Other districts have recently tried to copy its success.[19] Going back several centuries, English plaintiffs for most of the period 1600-1799 could choose to sue in any of the three common law courts, and there is evidence that the courts competed for cases by making the law more pro-plaintiff.[20] Similarly, in recent years, trademark owners could unilaterally choose an arbitrator to resolve disputes over internet domain names. Academic arbitrators who favored strong fair use rights quickly went out of business, while the remaining arbitrators developed a jurisprudence more protective of trademarks than that applied by any national legal system.[21]

While the problem of jurisdictional competition is most severe when the plaintiff has complete choice of forum, it is a potential problem whenever there are at least two fora among which the plaintiff can choose. So, for example, under the purposeful availment regime currently enforced by the Supreme Court, a plaintiff suing a corporate defendant will often have

[18] Data for 2012 downloaded from lexmachina.com on February 8, 2012. See also Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of The Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH 193 (2007).

[19] Xuan-Thao Nguyen, *Justice Scalia's 'Renegade Jurisdiction': Lessons for Patent Reform*, 83 TUL. L. REV. 111, 155 (2008)

[20] Daniel Klerman, *Jurisdictional Competition and the Evolution of the Law*, 74 U. CHI. L. REV. 1179 (2007) (Pre-modern English common law evolved in a pro-plaintiff direction, because judges were paid partly out of court fees and plaintiffs chose the court).

[21] Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT'L L. 903 (2002) (trademark owners unilaterally choose arbitrators in domain name disputes, and, as a result, arbitration providers which favor trademark owners get most of the business and fairer arbitrators exit the market.); Milton L. Mueller, *Rough Justice: A Statistical Assessment of ICANN's Uniform Dispute Resolution Policy*, 17 INFORMATION SOC'Y 151 (2001).

Electronic copy available at: https://ssrn.com/abstract=2422524

three or more fora from which to choose – the state where the defendant is incorporated, the state where the defendant is headquartered, and the place where the defendant and plaintiff interacted. Thus, in an employment suit involving an employee employed in California by a company headquartered in Illinois and incorporated in Delaware, the plaintiff could choose to sue in California, Illinois, or Delaware. As a result, if courts in those states have an incentive to hear more cases, there is a danger of destructive competition. Whether competition of that sort occurs is a subject of some dispute. Organizations, such as the American Tort Reform Association, claim that such competition has resulted in "judicial hellholes," such as Philadelphia, West Virginia, and Madison County. Whether those claims are correct has, to my knowledge, never been rigorously analyzed.

The danger of forum selling and the pro-plaintiff bias provide strong reasons for constitutional regulation of personal jurisdiction, and, in particular, for rules that impose limits on jurisdictional choice. For the purposes of preventing forum selling, the content of the rules is not of central importance. For example, a rule that allowed suit only where the plaintiff resided would constrain jurisdictional choice just as well as a rule that allowed suit only where the defendant was headquartered. More realistically, jurisdictional rules could probably adequately prevent forum selling by restricting jurisdiction to a small number of states, perhaps where the defendant is incorporated, where the defendant is headquartered, where the plaintiff resides, and the state that is the center of the contacts between the plaintiff and defendant. As noted above, there is still some danger of jurisdictional competition between a small number of states, but most cases of forum selling have occurred when plaintiff jurisdictional choice was close to unlimited, so modest restrictions on forum shopping are probably sufficient.

A clear doctrinal implication of this analysis is a narrow conception of general jurisdiction. Under some views of general jurisdiction, a corporation, such as Starbucks, that has a physical presence in all fifty states would be subject to general jurisdiction in all states. That would clearly give rise to substantial forum shopping and the danger of forum selling. As a result, it makes sense to restrict general jurisdiction to one or two states, such as the states where the defendant is headquartered or incorporated. Although, the Supreme Court has not clearly demarcated the scope of general jurisdiction, it is noteworthy that its most recent cases on the issue suggest that general jurisdiction is appropriate only where the corporation is "at home."[22] While the phrase "at home" is rather vague, it suggests a narrow conception of general jurisdiction. One could plausibly argue that an individual is generally "at home" in only one place. For corporations, the idea that there is general jurisdiction both where the corporation is headquartered and where it is incorporated is so ingrained that it is unlikely that a court would restrict general jurisdiction to only one state. Nevertheless, it seems that the Court is inclined to restrict general jurisdiction for corporations to only those two states. In that regard, it is noteworthy that the only case in which the Supreme Court has held that there was general

[22] Goodyear Dunlop v. Brown, 131 S. Ct. 2846, 2851, 2854, 2857 (2011); Daimler v. Bauman, 134 S.Ct. 746, 754, 760, 761 (2014).

Electronic copy available at: https://ssrn.com/abstract=2422524

jurisdiction over a corporation involved a corporation sued in the state where it was headquartered.[23]

C. PRO-RESIDENT BIAS

Even where there is no jurisdictional competition, there is a danger that the law may be biased. Consider for example, a jurisdictional rule that allowed the plaintiff to sue only where she resided. Under such a rule, the plaintiff would always be an in-state resident, whereas the defendant would often be from out of state. As a result, courts would have an incentive to be biased in favor of plaintiffs. This bias could take two forms. Courts could create substantive and procedural rules that favored all plaintiffs, or they could apply general rules in a discriminatory way.

Discriminatory application of general rules is relatively easy to implement. Jurors are probably disposed to favor in-state parties, so, if judges are not vigilant in preventing lawyers from appealing to that prejudice, jurors are likely to favor the in-state party. Empirical evidence collected by Eric Helland and Alexander Tabarrok suggests that judges in states with partisan elections do a poor job of curbing juror bias, and, as a result, damage awards against out-of-state corporations in such states are about thirty percent higher than in federal court or state courts with other judicial selection mechanisms.[24] There is also anecdotal evidence that even judges may indulge in bias against outsiders. For example, a former Chief Justice of the West Virginia Supreme Court has written:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.[25]

Because discriminatory application of general rules does not directly harm in-state defendants, it is probably a state's best strategy. Nevertheless, states might also rationally create substantive and procedural rules that are pro-plaintiff. Although such rules will harm in-state defendants, the benefits to in-state plaintiffs may outweigh the harm to in-state defendants, because there will be more in-state plaintiffs. Under the plaintiff-residence jurisdictional rule, for example, all plaintiffs will be local, while only some defendants will be. The temptation to skew the rules will be especially large in legal fields, such as product liability, where nearly all defendants are from out of state.

---

[23] Perkins v. Benguet Consolidated Mining, 342 US 437 (1951) (finding general jurisdiction in Ohio over a company incorporated in the Philippines when the president and general manager operated the company from Ohio on account of the Japanese occupation of the Philippines during World War II).

[24] Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J. L. & ECON. 341 (1999); Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. ECON. REV. 341 (2002).

[25] RICHARD NEELY, THE PRODUCT LIABILITY MESS 4 (1988). It should be noted that there is considerable controversy about the veracity of Neely's assertion and whether he wrote what he did solely to advance a particular tort reform agenda.

Electronic copy available at: https://ssrn.com/abstract=2422524

Although the analysis in this subsection has so far focused on the plaintiff residence jurisdictional rule, a defendant residence jurisdictional rule would generate very similar problems. Such a rule would encourage states to be biased in favor of defendants, either by discriminatory application of neutral rules (e.g. low damages when the plaintiff was out-of-state and the defendant was local) or rules that were generally pro-defendant. Pro-defendant rules would not only benefit local defendants, but they would encourage firms to locate in-state, thus increasing employment and the tax base.

In some situations, a rule that selected other fora could also generate biases. For example, if a purposeful availment rule selected the state where the defendant had a large factory, decisionmakers in that forum might be biased in favor of the defendant in order to retain the benefits of that factory or in order to attract similar factories and the employment they bring.

D. CONSTITUTIONAL CONSTRAINTS ON BIAS

So far, the analysis has assumed that there are no constraints on state adjudication. If it suited them, states could be biased against out-of-state corporations, and they could enact pro-plaintiff or pro-defendant rules. In a federal system like the United States, of course, there are some constraints on bias, most importantly, the Due Process Clause of the Fourteenth Amendment. The dormant Commerce Clause might also provide a doctrinal hook for federal courts to restrain state court bias. A state that blatantly discriminated against out-of-state residents would certainly fall afoul of the Constitution. Similarly, if one state, such as Nevada, fashioned extremely pro-plaintiff procedural and substantive rules to attract litigation, defendants could probably bring a successful Due Process challenge. On the other hand, more subtle discrimination can be important and yet immune from constitutional scrutiny. As noted above, Helland and Tabarrok estimate that, in states with judiciaries selected by partisan elections, tort awards against out-of-state corporations are roughly 30% higher than those against local businesses, controlling for relevant factors. Such discrepancies have never been the subject of constitutional attack, and, given the Supreme Court's aversion to statistical evidence of discrimination in death penalty cases, it seems unlikely that the federal courts would try to constrain biases against out-of-staters in civil litigation. Similarly, given the Supreme Court's reluctance to perform incidence analysis in Commerce Clauses cases, if a state adopted facially neutral rules that benefited in-state plaintiffs (or defendants), it seems unlikely that such rules would be successfully challenged.

If states were allowed not to recognize judgments from biased states, that would provide another constraint on state court bias. Of course, this constraint would only apply when the defendant did not have sufficient assets in the forum state so that enforcement elsewhere was necessary. In addition, under the Full Faith and Credit Clause, state courts have very limited ability to inquire into the fairness of other state's proceedings, so this avenue is unlikely to provide more protection than a Due Process challenge. On the other hand, as discussed below, if

Electronic copy available at: https://ssrn.com/abstract=2422524

the issue is enforcement across national boundaries, where Full Faith and Credit does not apply, fairness inquiries by an enforcing court could provide more protection.

E. MARKET INCENTIVES TO REDUCE BIAS

In some circumstances, markets may provide incentives for states to treat out-of-state residents and corporations fairly. For example, consider a Delaware corporation with a factory in California that emits noise pollution. If the neighbors sued the corporation in California court for nuisance, one might expect the California court to be biased in favor of the local plaintiffs. Nevertheless, if California is interested in encouraging business to locate factories in California (or in retaining the factories already there), it has an incentive to provide fair adjudication.

Similarly, if a California and a Delaware resident contract with each other, and the California resident sues the Delaware resident for breach of contract in California court, one might think that California courts would have an incentive to be biased in favor of the California plaintiff. Nevertheless, this would be short-sighted, because if California got a reputation for favoring its residents in contract suits, contracting parties would demand price adjustment, prefer non-California contracting parties, or insist on forum selection clauses that chose a forum other than California.

There might even be market incentives in some tort suits. For example, if a Delaware resident got into an auto accident in California, and the California resident sued in California court, one might think that the California courts would have an incentive to be biased in favor of the local plaintiff. On the other hand, if California courts got a reputation for being biased against outsiders in car crash cases, tourists and business people might be reluctant to come to California, or, if they did, they might always take taxis instead of renting a car, which would have the effect of raising the cost of visiting California. To the extent that California benefits from tourists and other travelers, it has an incentive to provide fair adjudication of such disputes.

Of course, the incentives discussed in the prior paragraph are unlikely to be perfect. It would take quite a pronounced bias in automobile cases to affect the decision of potential tourists and business people about whether to come to California. Similarly, subtle biases are unlikely to be noticed by all but the most sophisticated contracting parties.

It is also important to note that sometimes there will be no market constraints on bias. For example, if the issue is internet defamation in which a Delaware blogger defames a California resident on a website hosted in Illinois, there is little market incentive for California courts not to be biased in favor of the California plaintiff. Similarly, Delaware and Illinois courts have no reason not to be biased in favor of the defendant. In a car crash in California between a California resident and a Delaware resident, if the Delaware resident sued in Delaware, there would be no market constraint on a Delaware court's pro-plaintiff bias. Unlike the situation discussed above where the suit was in California, and California had to take into account possibly deterring out-of-state visitors, Delaware has nothing to lose from being biased against

Electronic copy available at: https://ssrn.com/abstract=2422524

the California resident injured on California roads (assuming it can restrict bias to such cases), because biased adjudication in such cases won't result in fewer tourists to Delaware.

F. PURPOSEFUL AVAILMENT

The analysis in the previous section suggests that it might be possible to design jurisdictional rules to maximize the effectiveness of market incentives to constrain bias. For example, it suggests that, in a car accident happening on California roads between a California and a Delaware resident, jurisdiction in California, the place of the accident and residence of the plaintiff, is more likely to lead to fair adjudication than jurisdiction in Delaware, the residence of the defendant. The conditions for market constraint can be described more generally as follows:

State X can assert jurisdiction over an out-of-state defendant based on action Y, if:

1) Action Y conferred substantial benefit on the residents of state X, and
2) The defendant could have refrained from action Y without significantly harming itself. Losing business solely in state X or refraining from activity solely in state X does not count as significant harm.

Because of their similarity to the Supreme Court's purposeful availment analysis, this section will refer to these conditions as purposeful availment. The importance of the first condition – benefit to residents of state X – is relatively straightforward. It is the benefit to citizens of state X that gives the legislature and courts of state X a reason not to be biased. If they are biased, then, according to condition 2, the defendant has a credible threat to withdraw the benefit. The credibility of the threat depends, of course, on how much the defendant loses from refraining from Y, the jurisdiction-conferring action. The defendant was doing action Y voluntarily, so presumably it was getting some benefit from doing so. As a result, refraining from action Y will almost always have some negative impact on the defendant. Nevertheless, condition 2 requires a "significant" harm, to distinguish situations where the defendant really had a choice about action Y from situations where it did not. The clarification that losing business solely in state X or avoiding activity solely in state X makes sense when each state is small. When states are large or populous, such as California or New York, the credibility of the threat to leave the state may be undermined.

For example, if state X asserts jurisdiction over the defendant based on the fact that the defendant drove a car in state X, condition 1 would be satisfied, because driving a car in State X usually benefits citizens of state X, for example, by bringing business to gas stations, restaurants, hotels, and other businesses. In addition, the defendant could usually have refrained from driving in X without significantly harming itself several ways. If the defendant was a tourist, the defendant could spend her vacation time elsewhere. This would impose some harm on the tourist, because presumably State X is the defendant's first choice destination. Nevertheless, other states are also fine places to visit, so choosing the second most preferred tourist destination is unlikely to be a significant harm. Or, the tourist could visit State X, but use taxis or public

Electronic copy available at: https://ssrn.com/abstract=2422524

transportation to avoid driving there. Similarly, if the defendant was driving through the state to get to another state, then the defendant could drive around the state. This would impose some cost –additional time and gas – but it is usually possible to choose a route that avoids state X without significant extra cost.

On the other hand, if a state asserted jurisdiction over a manufacturer based on the fact that the manufacturer sold a car that was driven to the state, condition 1 would be satisfied, because residents of state X benefit from people driving to the state. On the other hand, it is nearly impossible for a manufacturer to prevent a car from being driven into State X. The manufacturer could stop selling cars in X, but that would not prevent people from buying cars in other states and driving them into X. Even if a manufacturer required purchasers to sign contracts promising not to drive their cars to state X, contracts do not run with chattels, so those who bought the car second-hand would be free to drive their cars to State X. So the only plausible way the manufacturer could prevent the car from being driven to the state would be not to sell any cars in the U.S. (or perhaps anywhere in the world). This would significantly harm the manufacturer and have effects on residents of other states, so the second condition would fail. This reasoning helps justify the Supreme Court's reasoning in *World-Wide Volkswagen* v. *Woodson*.[26] Subsection iii below provides more examples of actions that would and would not meet the conditions above.

They key policy objective of the purposeful availment requirement according to this paper is that it gives the defendant a credible threat to cease or relocate its activities, and this threat gives states an incentive to adjudicate fairly. Although the Supreme Court has certainly never articulated this rationale for the purposeful availment requirement, it has stated that one of the goals of its personal jurisdiction jurisprudence is "to allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[27] The idea that potential defendants should be able to "structure their primary conduct" in a way that makes jurisdiction predictable is similar to the idea in this paper that defendants should have a credible threat to cease or relocate their activities to avoid jurisdiction in a particular state. The main difference is that the Supreme Court has never fully explained why it is important that defendants be able to structure their conduct so as to make jurisdiction predictable, whereas this article suggests that that ability is important in order to encourage states to create legal institutions that treat out-of-state parties fairly.

The role that purposeful availment could play in restricting bias was briefly discussed by Lea Brilmayer in response to an argument for jurisdiction in *World-Wide Volkswagen*:

---

[26] World-Wide Volkswagen v. Woodson , 444 U.S. 286 (1980). Of course, the issue in *World-Wide Volkswagen* was jurisdiction over the retailer and distributer, not over the manufacturer. Nevertheless, the reasoning in that case would suggest that a manufacturer whose cars were sold only in the New York area could not be sued in Oklahoma solely because a consumer drove one of the cars to Oklahoma and got into an accident there.

[27] Burger King Corp. v. Rudzewicz, 471 U.S. at 472; *World-Wide Volkswagen*, 444 U.S. at 297.

Electronic copy available at: https://ssrn.com/abstract=2422524

> The reason for limiting jurisdiction to cases where the defendant had some control over the eventual location of the product is to prevent the forum from always shifting the cost to persons to whom its sovereignty does not extend, namely, the out-of-state consumers who have no contact with the forum. If the defendant deliberately sent a product into the state, he has a choice to stop marketing there if the costs of doing business exceed the value to him of that market. And the State is unlikely to impose upon him jurisdictional burdens exceeding the actual cost of his activities there, because the state does not want to discourage his activities in the State unless the benefits of the activities are less than the burdens. But if jurisdiction can be asserted even where the defendant has no control, these checks cannot be assumed to be adequate. Since the defendant cannot structure his conduct in a way that makes him immune to suit there, the State is not adequately restrained by the possibility that that the defendant will withdraw from its markets. And it cannot be inferred that taking advantage of activity in the forum was sufficiently profitable, even given the added jurisdictional costs, that the defendant may fairly be presumed to have agreed to take his chances. [28]

In this passage, Brilmayer sketches some of arguments fleshed out in this section -- the danger of interstate redistribution, the way purposeful availment gives potential defendants an exit option, and the way the threat of exit gives states an incentive to moderate "jurisdictional burdens." On the other hand, Brilmayer's analysis is solely a response to an opposing argument rather than the foundation for her thinking about personal jurisdiction generally. In addition, the costs or "jurisdictional burdens" she is concerned are unclear, although they seem to be ordinary litigation expenses, rather than the local favoritism that animates analysis in this section.

i. Purposeful availment and rogue states

One way of thinking about the purposeful availment requirement is to assume a rogue state. Suppose West Virginia courts and legislators had created substantive and procedural rules that were strongly pro-plaintiff, and suppose West Virginia juries were inclined to award unjustifiably high damages against out-of-state defendants, even when the defendant had done no harm. Some jurisdictional rules would allow substantial redistribution to West Virginia residents. For example, if a plaintiff could always sue in the state in which she resides, then West Virginia residents could sue out-of-state corporations on trumped up claims and receive high awards. Under the jurisdiction-where-plaintiff-resides rule, there is nothing the defendant could do to avoid such suits (except go out of business), because jurisdiction is not based on any conduct that the defendant can control. In contrast, if jurisdiction is based on whether defendant has a factory or sells products in West Virginia, then the defendant could avoid jurisdiction in West Virginia by locating its factories elsewhere and selling its products elsewhere. If enough

[28] Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, SUP, CT. REV. 77, 95-96 (1980).

Electronic copy available at: https://ssrn.com/abstract=2422524

businesses refused to locate or sell in West Virginia, West Virginia courts and legislators might reform their legal system to reduce or eliminate bias.

ii. Purposeful availment and tax

Another helpful way of thinking about purposeful availment is to analogize unfair adjudication to a tax on out-of-state businesses. Just as the Due Process Clause restricts the ability of states to tax out-of-state business activity, so the purposeful availment requirement (also grounded in the Due Process Clause) restricts the ability of states to adjudicate disputes involving out-of-state activities. If states could tax out-of-state business activity, they would have strong incentives to tax heavily to benefit local citizens. Similarly, if states could adjudicate suits involving out-of-state activities, then they would have a strong incentive to use the court system to redistribute from out-of-state defendants to in-state plaintiffs. The purposeful availment requirement can be seen as a way of defining what is means for a defendant to do business in-state so as to limit the incentive of state legislators, judges, and juries to use the court system to benefit locals at the expense of outsiders.

iii. Examples applying purposeful availment as described above

The following are examples of situations where the purposeful availment requirement would be satisfied under the test set out above.

Operating a factory in State X. The factory provides employment and other benefits in State X, and the owner could locate or move the factory elsewhere.

Sending sales agents or employees into state X to physically do business there. State X benefits by having people do business in state. If the defendant did not send its agents or employees into state X, it would lose the profits from business in State X, but it would continue to be able to do business in other states. The loss of business solely in State X would not be considered "significant" harm under condition 2. This result is consistent with *International Shoe*.[29]

Selling a product to a resident of State X in circumstances where the defendant knew or could easily have known that the purchaser was a resident of State X. State X's citizens benefit from access to an array of goods and services. If the defendant stopped selling products to State X's residents, then it would lose profits from those sales, but its profits from other states would be unaffected, so condition 2 is satisfied. This result is consistent with *McGee* v. *International Life Insurance Co*.[30] If the defendant doesn't know and can't reasonably ascertain the residence of the purchaser, then it is not plausible for it to stop doing business with residence of State X. This exception might apply, for example, to the sale of groceries in a store in State Y to a person from State X. Although the store

[29] International Shoe v. State of Washington, Office of Unemployment, 326 U.S. 310 (1945).
[30] McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957)

Electronic copy available at: https://ssrn.com/abstract=2422524

could ask every customer for ID so that it could refrain from selling to residents of X, this would impose significant costs on residents of state Y.

Shipping a product to State X. State X's consumers benefit from receiving the products, and the defendant could refuse to ship to State X without affecting profits from other jurisdictions. This would result in jurisdiction over cases arising from internet or mail-order sales.

Travel to State X. Travelers generally benefit a state by providing social and business opportunities, but travelers generally have the option of not traveling or traveling elsewhere. Jurisdiction is this situation is consistent with *Burnham* v. *Superior Court.*[31]

Selling a magazine in State X that contains defamatory content. Sale of the magazine provides benefits to residents of State X. The defendant could refrain from selling the magazine in that state. This is consistent with *Keeton* v. *Hustler.*[32]

Posting a defamatory webposting accessible from state X on a website not hosted in State X, if technology exists to block access from citizens from state X. The webposting presumably provides benefits to citizens of State X who want to access it. Whether the second condition is satisfied depends on technology. If the person posting could block viewers from State X without blocking viewers from other states, then the defendant could refrain from being accessed in State X by using that technology. As a result, if the defendant chose not to use that technology, it would have purposefully availed itself of State X.

Selling a product that is sold through wholesalers and/or retailers to consumers in State X. State X gets a benefit from a wide variety of products and lower prices in state. Since a seller could use contracts to prevent wholesalers from selling into State X or from selling to others who would sell in to State X, the seller could prevent products from reaching State X through wholesalers and retailers without loss of profits from sales to other states. This result is inconsistent with the Supreme Court's recent decision in *McIntyre* v. *Nicastro.*[33] The majority in *McIntyre* did not consider the possibility that the manufacturer could have used contracts to prevent distribution in New Jersey, and that the failure to use such contracts should be considered purposeful availment of New Jersey. Nor did it consider the possibility that the manufacturer could, though contracts with its distributor, raise prices to consumers in high liability states.

Acting as trustee for a trust with trustor or beneficiaries in State X. State X benefits from having citizens who are trustors or beneficiaries of trusts. Since the trustee could

[31] 495 U.S. 604 (1990).
[32] 465 U.S. 770 (1984).
[33] 131 S. Ct. 2780 (2011). For detailed analysis of this issue, see Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551 (2012).

Electronic copy available at: https://ssrn.com/abstract=2422524

have written a contract that stated that the trustee could resign if the trustor or beneficiary moved to State X, the trustee could have refrained from the jurisdiction-triggering activity without loss of trustee business in other states. Similarly, the trustee could have included a forum selection clause in the trust. Allowing jurisdiction in this situation is inconsistent with *Hanson* v. *Denckla*.[34]

Incorporating in State X. Incorporation provides fees and other benefits to State X, and the corporation could incorporate elsewhere.

Locating headquarters in State X. Headquarters provide employment and other benefits to residents of State X, and the company could locate elsewhere.

Here are some examples of actions that would *not* be considered purposeful availment under the test above:

Posting an allegedly defamatory internet posting on a website accessible from State X but not hosted in State X, if no technology exists to block access in state X. If the person posting the content could not block access by residents of State X without also blocking access to others, then the second condition is not satisfied. Allowing State X to have jurisdiction in this case gives State X an incentive to be inefficiently pro-plaintiff, because State X's citizens get all the benefits from excessively pro-plaintiff law (either high damages or removal of the harmful material), but State X's citizens bear only a fraction of the cost of doing so (because, if the website were taken offline, citizens of other states also lose the benefit of access to the allegedly defamatory material). This suggests that jurisdiction based solely on negative effects should not be proper, even if those negative effects were intended.

Operating a factory in State Y that pollutes State X. This is a situation where citizens of State X get no benefit from the defendant's activity. In this situation, State X has an incentive to be pro-plaintiff, because local citizens get the benefits of high damages or stopping the pollution, but there are no negative consequences if the defendant inefficiently ceases or relocates its activities. Like the previous example, this suggests that jurisdiction based solely on negative effects should not be proper.

Plaintiff resides in State X. Since potential defendants have no control over where potential plaintiffs reside, there is nothing potential defendants can ordinarily do to prevent

[34] Hanson v. Denckla, 357 U.S. 235 (1958). The Supreme Court does not seem to have considered the possibility that the trustee could have resigned when Mrs. Donner, the trustor, moved to Florida or that the trustee could have insisted on a forum selection clause. Instead, the Court focused on the fact that Mrs. Donner's move to Florida and the location of the beneficiaries was beyond the trustee's control. That focus on the trustee's control is consistent with the approach taken here, although its application seems flawed.

Electronic copy available at: https://ssrn.com/abstract=2422524

the jurisdiction triggering action. In accord with current law, this suggests that plaintiffs cannot sue in a state simply because they reside there.

Plaintiff sued in State X. Since potential defendants ordinarily have no control over where potential plaintiffs sue, there is nothing potential defendants can do to prevent the jurisdiction triggering action. In accord with current law, this suggests that plaintiffs should not have complete choice of forum

iv. Should there be a nexus between the jurisdiction-triggering event and the lawsuit?

The definition of purposeful availment outlined about does not require any nexus between the jurisdiction-triggering event and the events that give rise to the lawsuit. For example, if a defendant sells products to citizens of California, it could be sued in California even by persons who purchased their products in Massachusetts. Similarly, if the defendant travels to California, it could be sued for breach of contract in California, even if the contract was entered into and intended to be performed in Massachusetts. This contrasts with current Supreme Court doctrine, which distinguishes between general and specific jurisdiction. If jurisdiction is general, then no nexus is necessary. General jurisdiction applies in only a few situations, such as when a corporate defendant is headquartered or incorporated in the state, or an individual is a citizen of a state or is physically present when served with process. Other jurisdictional situations, such as jurisdiction based on selling products or driving in a state, give rise only to specific jurisdiction. That is, the state has jurisdiction over the defendant only when the litigation arises out of those contacts. Thus, under current law, a state would have jurisdiction over the defendant relating to a car accident that happened in the state, but the fact that the defendant was driving in the state would not give the state jurisdiction over an unrelated breach of contract suit. Similarly, if the defendant sold a product in state, it could be sued for breach of contract or product liability, but not for unrelated auto accidents or employment disputes.

Applying a nexus requirement does not fundamentally change the way that purposeful availment helps constrain state court bias. Whether there is a nexus requirement or not, if a state gets benefit from defendant's action and defendant has a credible threat to refrain from or relocate that action, the state has an incentive to adjudicate fairly. If there is no nexus requirement, then biased courts have a bigger effect on the defendant. For example, if Nevada courts were biased against out-of-state defendants, then a corporation which had its employees drive through Nevada could be subject to Nevada courts not just for auto accidents, but also for every other dispute the corporation might be involved in – breach of contract, employment disputes, patent disputes, etc. While this might seem very problematic, it could actually be beneficial. By increasing the negative consequences of the jurisdiction triggering event (driving in Nevada), the lack of a nexus requirement makes it more plausible that the defendant would actually instruct its drivers to avoid Nevada (e.g. by driving to California through Arizona or Idaho and Oregon). This, in turn, gives Nevada a greater incentive to constrain the bias of its courts. In contrast, if the only consequence of driving through Nevada is biased adjudication of

Electronic copy available at: https://ssrn.com/abstract=2422524

auto accident cases, then it is much less likely that the corporation would instruct its drivers to incur the added expense of driving around Nevada.

While the reasoning in the previous paragraph might suggest that the nexus requirement is undesirable, there are three counterveiling considerations. First, a nexus requirement would increase the predictability of the law. Without a nexus requirement, large corporations are likely to be subject to jurisdiction nearly everywhere for all suits. Especially if choice of law is forum-dependent, this means that large corporations would have difficulty predicting where they would be sued and potentially what substantive law would apply. A nexus requirement significantly reduces plaintiff choice of forum and thus enhances predictability. Second, because the absence of a nexus requirement would give plaintiffs substantial choice of forum, there is a danger of forum selling. Third, a nexus requirement would reduce litigation costs by making it more likely that litigation takes place close to relevant witnesses. That is, if plaintiff in an employment dispute must sue where he or she was employed, the supervisors, who are likely witnesses, are likely to be located near the forum. On the other hand, if a plaintiff in an employment suit can sue where the defendant had an unrelated factory or wherever employees traveled for business purposes, plaintiff might choose to sue far from the location of witnesses, just to secure a forum that was pro-plaintiff in substantive law or procedure.

v. Relationship to Supreme Court doctrine

As pointed out in the examples discussed above, the version of purposeful availment proposed here is similar to, but not identical to, purposeful availment as applied by the Supreme Court. There are two principal differences.

First, the Supreme Court focuses on benefits to the defendant, whereas purposeful availment as discussed above focuses on benefits to the forum state. Since consensual actions are usually mutually beneficial, the two versions of purposeful availment will usually reach the same result. Thus, if the defendant locates a factory in State X, that action is likely to benefit both the defendant and residents of State X.

Second, the Supreme Court does not carefully consider the full range of actions a defendant could take to avoid jurisdiction. For example, in *Hanson* v. *Denkla*, the Court held that the trustee did not purposefully avail itself of Florida, because the trustor unilaterally moved to Florida. Nevertheless, the court did not consider the possibility that the trustee could have contracted with the trustor to be able to resign from the trusteeship when the trustor or a beneficiary moved to Florida. The administrator's ability to do so is enough to give Florida some incentive not to be biased against trustees in trust litigation. As a result, it should be sufficient to show purposeful availment. Similarly, in *McIntyre*, the Supreme Court did not consider the possibility that the UK manufacturer could have contracted with its Ohio distributor not to ship products into New Jersey. The manufacturer's ability to do so is enough to give New

Electronic copy available at: https://ssrn.com/abstract=2422524

Jersey an incentive not to be biased against foreign manufacturers. As a result, selling goods through a national distributor should be sufficient to show purposeful availment in every state.

This article's version of purposeful availment conflicts with broad interpretations of *Calder* v. *Jones*.[35] Such interpretations assert that jurisdiction could be based solely on effects in the forum state and would authorize jurisdiction whenever defamation injured a forum resident, even if the defendant had no other connections with the forum state. Similarly, such a broad interpretation would endorse jurisdiction when a factory in one state caused pollution in the forum state. As noted above in Section III.F.iii, jurisdiction in those situations would not be consistent with this article's interpretation of purposeful availment, because the defendant could not stop the harm in the forum state without affecting persons in other states or because citizens of the forum state receive no benefits from the defendant's activities. As a result, the defendant has no credible threat to withdraw benefits from the forum state if that state's courts treat it unfairly. Fortunately, the Supreme Court in *Walden* v. *Fiore* recently rejected the broad interpretation of *Calder*.[36] The court in *Walden* stated that "mere injury to a forum resident is not a sufficient connection to the forum" and explained that jurisdiction in *Calder* was based not simply on the fact that a California resident was defamed, but on the fact that the defendant made phone calls to California and wrote about activities in California in a magazine that was widely circulated in California. The Court's rejection the "effects test" for jurisdiction is consistent with this article's interpretation of purposeful availment.

It is also interesting that *Walden* v. *Fiore* contains reasoning that undermines the plurality decision in *McIntyre*.[37] One problem with *Walden's* interpretation of *Calder* is that the defendants in Calder were the writer and an editor; the *National Inquirer*, which published and circulated the article, was not a party to the suit. Thus, it was not the defendants who published the article and circulated it in California. If publication and circulation in California are to count as connections or contacts supporting jurisdiction, they must somehow be attributed back to the defendants. The Supreme Court reasoned that it was appropriate to do so, because the defendants "knew the *National Inquirer* 'ha[d] its largest circulation' in California and that the article would 'have a potentially devastating impact' there."[38] This reasoning is in considerable tension with the plurality decision in *McIntyre* that a distributor's contacts with New Jersey, a major market for machine tools, cannot be attributed to a U.K. manufacturer of such tools. The tension arises because a manufacturer in a case like *McIntyre* is in a position very similar to that of a writer in a case like *Calder*. Just as a writer may rely on a publisher to distribute her work, so a manufacturer may rely on a distributor to distribute its product. Nevertheless, if the actions of a publisher's actions can be attributed to the writer, it would seem, *a fortiori*, that a

[35] 465 U.S. 783 (1984).
[36] 134 S. Ct. 1115 (2014).
[37] 131 S. Ct. 2780 (2011). For detailed analysis of this issue, see Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551 (2012).
[38] *Id* at n. 7.

Electronic copy available at: https://ssrn.com/abstract=2422524

distributor's actions should be attributable to the manufacturer, because the manufacturer is ordinarily in a much stronger position to influence or control the distributor of its product than a writer is to control the publisher of her writing. That is, the reasoning in *Walden* seems more consistent with this author's and this article's views on stream of commerce jurisdiction than with the plurality decision in *McIntyre*.[39]

vi. Plaintiff purposeful availment

So far analysis in this section, like analysis in Supreme Court cases, has focused on the defendant and asked whether the defendant purposefully availed itself of the forum. It is reasonable to ask, however, why jurisdiction should focus exclusively (or nearly exclusively) on the defendant. As noted above, there is a danger of pro-defendant as well as pro-plaintiff bias. So, for example, in the situation described above, where defendant posted allegedly defamatory material but had no ability to control whether the content was viewed in State X, it would seem consistent with purposeful availment for the appropriate forum to be defendant's residence. The defendant would always have purposefully availed itself of that forum, so one need not fear that the forum would be excessively pro-plaintiff. On the other hand, one should be concerned that that forum would be excessively pro-defendant. This suggests that the best forum would be one that both plaintiff and defendant had purposefully availed themselves of. Unfortunately, in the internet defamation case under consideration, there is no such state. As discussed further below, such cases would be appropriate for federal jurisdiction, because there is no state with an incentive to be fair.

Fortunately, there is usually at least one state that would satisfy purposeful availment for both plaintiff and defendant. For example, in a car crash, both parties would have purposefully availed themselves of the state where the crash occurred. Similarly, if jurisdiction is based on purchase of a product in a particular state, then both plaintiff and defendant would have purposefully availed themselves of the state where the purchase took place.

vii. A numerical example

The way purposeful availment helps reduce bias can be illustrated through a relatively simple example. Suppose a citizen of Kansas is considering driving in Colorado, perhaps to go skiing there or perhaps because she wants to get to Arches National Park in Utah and driving through Colorado is the most direct route. Of course, the Kansas citizen could go skiing in Utah. Or she could get to Arches National Park by driving north through Nebraska and Wyoming, but that would take much longer.[40] As a result, the Kansas resident gets $130 of benefit from driving through Colorado. The citizens of Colorado also get $60 in benefit from her travels. That $60

[39] For discussion of *McIntyre,* see Section III.F.ii above and Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551 (2012).

[40] A more complete analysis would also consider the incentives of Nebraska and Wyoming courts to be fair. To the extent that Nebraska and Wyoming would get more tourists if Colorado is biased but they are fair, competition among states for tourists would give states additional incentives to be fair.

Electronic copy available at: https://ssrn.com/abstract=2422524

benefit represents ski slope profits, hotel profits, restaurant profits, and profits from the sale of gas and other goods and services. The Kansas citizen can either drive safely or negligently. Driving safely costs $90, because it takes more time, requires costly maintenance of her vehicles, and requires her to pull over when she wants to use her cell phone. Even if she drives safely, there is a 0.5% chance of an accident causing $10,000 of harm to a Colorado citizen. (For this example, I ignore any harm she causes herself or her vehicle). If she drives negligently, there is an additional 1% chance of an accident causing $10,000 of harm to a Colorado citizen. Driving safely is efficient, because the precautions ($90) cost less than the additional expected harm from driving negligently ($100 = 1% of $10,000). If courts are fair, expected liability will equal expected harm from driving negligently (but not the expected harm that happens even if she drives non-negligently), and she will have an incentive to drive safely. For this example, consider three possibility levels of bias: courts are fair, moderately biased, or very biased. The table below summarizes the biases:

Table 1: Expected Liability of Out-of-State Litigant Depending on Forum Court Bias

	Defendant Negligent	Defendant not Negligent
Courts Fair	$100	$0
Courts Moderately Biased	$130	$30
Courts Very Biased	$150	$50

Fair courts award damages equal to harm when the defendant is negligent, but award no damages when the defendant was not negligent. Thus, in the chart, since negligence increases the probability of a $10,000 harm by 1%, expected liability with fair courts is $100, if the defendant is negligent, regardless of plaintiff and defendant residence. If the defendant is not negligent and the courts are fair, there will be no liability, regardless of the parties' residence. Biased courts, however, favor in-state litigants. If the defendant is out-of state, and the defendant was negligent, then the court or jury increases the damages. In this example, expected damages are increase by 30% to $130 or 50% to $150, depending on whether the courts are moderately biased or very biased. If an out-of-state defendant was not negligent, a biased court might still find it negligent and thus liable and award damages with expected value $30 or $50, depending on how biased the court is.

Whether courts are biased or fair, the Kansas driver will not be negligent. When courts are fair, this is clear, because the cost of precaution ($90) is less than expected liability ($100). If the defendant is out of state, the cost-benefit calculation is similar, because negligence still increases expected liability by $100 (from $30 to $130 with moderately biased courts or from $50 to $150 with very biased courts).

The table below shows the welfare of Kansas citizens, Colorado citizens, and overall welfare in this example.

Electronic copy available at: https://ssrn.com/abstract=2422524

Table 2: Purposeful Availment and Court Bias

CO Courts Fair	CO Courts Moderately Biased	CO Courts Very Biased
KS driver drives safely in CO **No law suits**	**KS driver drives safely in CO** **CO driver sues in CO**	**KS driver does not drive in CO**, because CO driver could sue in CO court and receive $50 in expected liability, even if the KS driver was not negligent. So the expected benefit of driving is negative (-$40 = $130 benefit of driving in CO - $90 cost of safety -$50 damages paid).
KS welfare: $40 = $130 benefit of driving in CO- $90 cost of safety -$0 damages paid	**KS welfare: $10** = $130 benefit of driving in CO- $90 cost of safety -$30 damages paid	**KS welfare: $0**
CO welfare: $10 = $60 benefit to CO of out-of-state driver -$50 expected harm + $0 damages received	**CO welfare: $40** = $60 benefit to CO of out-of-state driver -$50 expected harm + $30 damages received	**CO welfare: $0**
Overall welfare: $50	**Overall welfare: $50**	**Overall welfare: $0**

Even if Colorado courts consider only the welfare of their own residents, they will not be very biased, because high levels of bias scare away out-of-state visitors. Since many in-state businesses, including ski resorts, hotels, and restaurants depend on out-of-state visitors, Colorado has an interest in reducing court bias. Nevertheless, the rule does not give in-state residents an incentive to completely eliminate bias against out-of-staters. As the table indicates, Colorado residents do best with moderate levels of bias, which allow some redistribution from out-of-state interests, but not enough to deter visitors. A more complex model would allow continuous variation in the number of out-of-state visitors and in the level of bias, but the basic idea would be the same -- a trade-off between the amount of redistribution from out-of-staters and the number of out-of-state visitors. The optimal trade-off from the perspective of Colorado residents is likely to be neither complete fairness nor very high bias, but some intermediate level of bias.

Electronic copy available at: https://ssrn.com/abstract=2422524

While this is far from ideal, it is better than most other jurisdictional rules, which give residents no reason to moderate their courts' biases at all.

G. Individual decisionmaker incentives

Because this paper argues that good personal jurisdiction rules give states an incentive to moderate their biases, it is important to consider the mechanisms by which bias might be reduced. It is possible that individual trial court judges would be motivated to reduce bias because of the adverse effects that bias has on the state, e.g. reduced economic activity, increased prices, reduction in out-of-state visitors, or blocked websites. Nevertheless, because there are many trial court judges and the adverse effects of bias may be state-wide, judges would face a collective action problem. It is therefore more likely that reform would come either from the state supreme court or state legislature. Most obviously, state legislators and supreme courts have the dominant role in creating unbiased procedural, substantive, evidentiary, and choice of law rules, and they could use that position to create rules that would be binding on lower court judges. In addition, state legislators and supreme court judges have the ability to create rules that reduce the scope for biased decisionmaking by trial judges and jurors. The state supreme court might, for example, impose evidentiary rules that forbid lawyers to call attention to the out-of-state character of a party or the wealth of an out-of-state defendant. Similarly, a state legislature might initiate changes to the state constitution to eliminate partisan judicial elections, which empirical analysis has shown lead to much greater bias against out-of-state parties. The fact that federal courts are able to constrain local favoritism, even though they employ local juries, suggests that favoritism can be significantly reduced through efforts focused on the structure of the judiciary and on rules of evidence and procedure.

H. What if States don't maximize their resident's welfare?

Analysis so far has assumed that state legislators, judges, and jurors act to maximize the long-run welfare of in-state residents. While this assumption has some plausibility, it is clearly a simplification. Sometimes legislators act to favor powerful interests rather than constituent welfare. Judges and jurors may be moved by sympathy or ideological preference for one side or another. Such behavior complicates the analysis of the effect of personal jurisdiction on bias. If, for example, legislators and judges receive large campaign contributions from potential defendants, then they may favor defendants at the expense of in-state residents. If so, jurisdictional rules that gave judges and legislators an incentive to be more pro-plaintiff --for example the jurisdiction-where-plaintiff-resides jurisdictional rule -- might counteract the bias induced by campaign contributions and result in the least biased rules and adjudication. Conversely, if jurors were pro-plaintiff beyond what benefits state residents --for example, awarding such high damages that businesses were deterred from locating in the state – then a jurisdictional rule with pro-defendant incentives (e.g. jurisdiction where defendant resides) might counteract the pro-plaintiff bias and result in more efficient rules, procedures, and adjudication

Electronic copy available at: https://ssrn.com/abstract=2422524

I. How much does jurisdiction affect bias?

A key question is how strongly jurisdictional rules affect bias. If jurisdictional rules have a strong effect on bias, then it makes sense to choose rules, such as purposeful availment, that moderate adjudicative biases, even if they increase litigation costs. On the other hand, if the effect of jurisdiction on bias is small, then it makes sense to choose low-cost jurisdictional rules, such a litigation where the plaintiff resides.

There is, unfortunately, very little empirical research on the effect of jurisdictional rules on bias. As noted above, there is some evidence from patent litigation, pre-modern England and domain-name dispute resolutions systems supporting the idea that complete plaintiff choice of forum would lead to forum selling and thus to biased law. Whether other jurisdictional rules would have significant deleterious effects has not been studied empirically. In addition, even the best jurisdictional rules are unlikely to assure completely unbiased law. Empirical research suggests that the current jurisdictional rule, purposeful availment, does not fully constrain adjudicative biases, because tort awards against out-of-state parties tend to be about thirty-percent higher in states with judiciaries selected by partisan elections. On the other hand, we don't know how large awards against out-of-state defendants would have been if other jurisdictional rules had been in effect, so it is hard to know whether the purposeful availment requirement is currently playing a significant role in improving the quality of state law and adjudication.

IV. Diversity Jurisdiction and Personal Jurisdiction

A. Abolishing the Complete Diversity Rule

The bias issue could be almost entirely resolved through the expansion of federal diversity jurisdiction. While diversity jurisdiction is an issue of federal subject matter jurisdiction, and subject matter jurisdiction is usually analyzed separately from personal jurisdiction, personal jurisdiction and federal subject matter jurisdiction are more closely related than usually believed. If Congress authorized diversity jurisdiction to the full extent allowed by the Constitution, any case involving an in-state and an out-of-state party could be brought in federal court, and issues of personal jurisdiction in state court would largely disappear. If an out-of-state plaintiff perceived state courts to be biased, it would bring the case in federal court. If an out-of-state defendant perceived state courts to be biased, it could remove the case to federal court. Both lawyer wisdom and empirical research confirm the idea that federal courts are relatively impartial between in-state and out-of-state litigants.[41]

Article III, Section 2 of the U.S. Constitution states that "The Judicial Power shall extend to … Controversies … between Citizens of different States…." The federal courts have

[41] Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards,* 4 Am. L. Econ. Rev. 341 (2002).

Electronic copy available at: https://ssrn.com/abstract=2422524

interpreted that power narrowly by requiring statutory authority to adjudicate diversity cases and by interpreting Congressional grants of diversity jurisdiction stingily. Congress has limited diversity jurisdiction in a number of ways, most obviously by establishing a minimum amount in controversy, which is now $75,000. In addition, the Supreme Court has narrowly interpreted the statute authorizing diversity jurisdiction by requiring complete diversity, even though nothing in the text of the Constitution or jurisdictional statutes suggests such a limitation. With a few recent exceptions,[42] the complete diversity requirement excludes from federal jurisdiction any case in which any plaintiff is a citizen of the same state as any defendant. This exclusion is extremely important, because a skillful plaintiff's lawyer who wants to litigate in state court can often defeat federal jurisdiction by joining a non-diverse party. For example, suppose a California plaintiff wants to sue a Delaware defendant for product liability for a product sold by a California retailer. That would seem to be a case within federal diversity jurisdiction, because the plaintiff and manufacturer are citizens of different states. Nevertheless, if the plaintiff's lawyers wants to avoid federal court (as most plaintiff's lawyers do), she can simply join as a defendant the California retailer who sold the product. Since one defendant (the retailer) has the same citizenship (California) as the plaintiff, complete diversity is destroyed, and neither defendant can remove the case to federal court.

If the complete diversity requirement were abolished, either by statute or by the Supreme Court, personal jurisdiction would no longer be an issue in state court, except for small cases involving $75,000 or less. Any major case involving an out-of-state plaintiff or defendant, would be within federal jurisdiction, and either the plaintiff could bring the case in federal court or defendant could remove it there. This would remove two important sources of bias. One would no longer need to worry about the biased application of substantive legal rules. In addition, since federal procedure, including the Federal Rules of Civil Procedure and Evidence, apply to diversity cases, one would not need to worry about bias in procedural rules.

Nevertheless, one might still need to be concerned about bias in substantive legal rules and in choice of law, because federal courts in diversity cases apply state law in those areas. As discussed above, a state that anticipates that its residents are more likely to be plaintiffs in a particular category of cases, such as product liability, has an incentive to design legal rules that favor plaintiffs. Similarly, a state that anticipates that its residents are more likely to be defendants -- for example if the personal jurisdiction rule required suit where the defendant resided or was headquartered -- has an incentive to design legal rules that favor defendants. Under *Erie*, those biased rules apply even in federal court. In addition, one would think that states have incentives to fashion choice of law rules that ensure those pro-resident outcomes, primarily by favoring the application of forum law. Thus, a state that was trying to favor in-state plaintiffs would design both substantive rules favoring plaintiffs and choice-of-law rules mandating application of the forum state's law when suits were in that state's court.

[42] See, e,g, the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d).

Electronic copy available at: https://ssrn.com/abstract=2422524

Nevertheless, even though state law would formally be enforced in federal court, if the complete diversity rule were abolished, large parts of state law, such as product liability law, would be developed almost entirely in federal court. As a result, the problem of biased substantive rules would be substantially reduced. Of course, states could still adopt biased substantive rules through legislation or through the few cases that made it to state appellate courts. Nevertheless, the fact that common law in many areas would be developed primarily by federal courts would reduce the problem of biased rules. In addition, Congress probably has the power under the Commerce Clause to legislate rules for interstate contracts and torts. So if biased legal rules were a significant problem, Congress could both authorize federal jurisdiction and legislate federal substantive law.

Nevertheless, whether one needs to be concerned about bias in substantive legal rules and choice of law is more complex than it might seem. Bruce Hay has argued that states do not have incentives to choose pro-plaintiff law and pro-forum-law choice of law rules.[43] Instead, he has argued that a state's better strategy would be to make efficient substantive law and to choose choice of law rules that selected pro-plaintiff substantive law from other states when the plaintiff was from in-state. That is, if a California plaintiff sued a Delaware defendant in California state court, the California court would apply Delaware law, if it was more pro-plaintiff. Hay argues that this strategy is better for rationally self-interested states, because it does not deter firms from locating in-state. On the other hand, it benefits local plaintiffs, because they get the benefit of the favorable law of other states. Nevertheless, if all states adopted this strategy, all states would choose impartial, efficient legal rules, so such rules would apply wherever the plaintiff sues.

Whether Hay is correct or not, expansion of federal jurisdiction would solve most of the problem of bias against out-of-state residents. It would almost completely resolve the problem of biased application of legal rules and of bias in procedural rules. If Hay is correct that there is no incentive for states to have biased substantive rules, then there is no bias in substantive law to correct. Similarly, if, as Hay suggests, all states have efficient law, then there is no need to worry about biased choice of law rules, because there won't be much variation in state law. If one is less sanguine than Hay about state incentives to develop efficient substantive law, the problem with bias in the formation of substantive legal rules would remain, although it would be mitigated by the fact that, in many areas, federal courts would have a dominant role in developing the common law.

While expanding diversity jurisdiction might reduce bias, it could reduce the quality of federal adjudication generally. If Congress and the President didn't create additional judgeships, then federal judges would have less time to spend on each case. Even if the President was able to appoint more judges, it is probable that the average quality of the judiciary would go down, because it is unlikely that there are a sufficient number of high quality and politically palatable

[43] Bruce Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L. J. 618 (1992).

Electronic copy available at: https://ssrn.com/abstract=2422524

candidates. In addition, even if a sufficient number of high quality judges could be confirmed, the quality of appellate review would go down, because the Supreme Court would be able to hear a smaller percentage of all cases. Of course, the Supreme Court could adopt procedures (such as hearing cases in panels) that allowed it to increase its caseload, but such procedures would reduce the thoroughness of its decisionmaking processes. Although state judiciaries would shrink slightly, since cases involving out-of-state parties are a relatively small part of their dockets, it is implausible to think that elimination of the complete diversity rule would improve the quality of state courts appreciably.

B. TARGETING DIVERSITY JURISDICTION

A less drastic solution would be to allow diversity jurisdiction only in situations where other constraints on biased law and adjudication are likely to be ineffective. For example, diversity jurisdiction might be restricted to torts arising out of activities that provide no benefit to forum state residents.[44] This approach makes most sense if purposeful availment were the jurisdictional rule. As noted above, purposeful availment can be seen as a jurisdictional rule that aims to maximize the effectiveness of market constraints on bias. The rest of this subsection will assume purposeful availment is the jurisdiction rule.

As noted above, market constraints are likely to be very effective in contract disputes. If parties anticipate that personal jurisdiction rules will select biased adjudication, they can use a forum selection clause to choose a forum they perceive as more neutral, or parties can select arbitration. Similar arguments could be made to exclude from diversity jurisdiction torts that arise out of contractual relations, such as medical malpractice and product liability. As a result, contract and related litigation should be excluded from federal diversity jurisdiction.

In addition, as discussed above, market constraints are likely to be at least somewhat effective for torts arising out of activities that provide substantial benefits to forum state residents. So, for example, if states have employment discrimination laws that are excessively pro-plaintiff or apply such laws in ways that discriminate against out-of-state corporations, then employers are likely to take that into account when making their locational decisions. As a result, employment is likely to fall in such states. Since employment is a substantial local benefit, states, anticipating business locational decisions, have an incentive to moderate their laws and to apply them in even-handed fashion. As a result, such torts should be excluded from federal diversity jurisdiction.

On the other hand, as noted above, there are some torts for which there are no market constraints on biased lawmaking and adjudication. Interstate pollution is a good example. If plaintiffs could sue where they reside, the state has an incentive to favor the plaintiff, but no incentive to enact even-handed laws or to adjudicate laws fairly. As pointed out above, internet

[44] Judge Posner discusses such an approach to diversity jurisdiction in FEDERAL COURTS: CHALLENGE AND REFORM 281-82 (1996).

Electronic copy available at: https://ssrn.com/abstract=2422524

defamation might provide another, albeit more complex example, if there is no way to selectively block access in particular states

Federal diversity jurisdiction might also be justified in situations where market constraints were likely to be weak. For example, whether the possibility of people driving around a state is sufficient to induce states to adjudicate car accidents fairly is an open, empirical question. The example presented above suggested that it was plausible to think that market constraints could constrain biases partially, but not completely. As a result, federal diversity jurisdiction could be justified in such situations, if market constraints were determined to be insufficiently strong.

V. PERSONAL JURISDICTION IN FEDERAL COURT

With a few exceptions, such as antitrust, federal courts currently apply the same personal jurisdiction rules as state courts.[45] The analysis of the litigation cost consequences of personal jurisdiction rules is the same whether the case is in federal or state court. As discussed above, federal jurisdiction in diversity cases largely eliminates the problem of bias in adjudication and partially cures the problem of bias in rules of general application. In federal question cases, the issue of bias in both application and rule formation should be minimal. Nevertheless, when plaintiffs have substantial choice of forum, there is the danger of forum selling, as the example of patent suits in the Eastern District of Texas illustrates.

As a result, personal jurisdiction rules in federal court should focus on two things: reducing litigation costs and restricting plaintiff choice of forum. Thus, in federal court, it would make sense to use jurisdictional rules – such as jurisdiction in the state where plaintiff resides or where defendant is headquartered – that minimize litigation costs and restrict jurisdictional choice, even though those rules might lead to biased adjudication if they were applied in state court.

Different jurisdictional rules for federal and state court would lead to situations where a case could be brought in state court, but not in federal court in the same state, and vice versa. For example, if a plaintiff resided in New Jersey but worked in New York for an employer incorporated in Delaware and doing business exclusively in New York, if the personal jurisdiction rule in federal court were that the plaintiff could sue in where she resides (and nowhere else), the only federal courts with jurisdiction would be those in New Jersey. On the other hand, state courts in New York and Delaware would have jurisdiction, but federal courts there would not. *Erie* and its progeny have emphasized the importance of minimizing the differences between federal and state court so as to reduce forum shopping between federal and state court. For example, in the hypothetical employment discrimination suit just discussed, the plaintiff might choose to sue in federal court not because she feared bias in state court in New York or Delaware, but rather because suing close to home was more convenient. On the other

[45] FRCP 4(k)(1)(A).

Electronic copy available at: https://ssrn.com/abstract=2422524

hand, it is not clear why this aspect of plaintiff choice is problematic. While this article has generally argued that forum shopping is problematic because it may lead to forum selling, the forum selling problem is not aggravated by a rule that means that the federal court with jurisdiction might be in a different state than the state courts with jurisdiction. The extent of forum selling is largely determined by the number of courts with jurisdiction, not their physical location. In the employment discrimination suit just discussed, the number of courts with jurisdiction would actually go down if the federal court applied a different jurisdictional rule than state courts. If federal court applied the same jurisdiction rules as state court, there would be jurisdiction in four courts: federal court in New York and Delaware and state courts in New York and Delaware. If federal courts applied the plaintiff-residence only jurisdiction rule, then there would be only three courts with jurisdiction: federal court in New Jersey and state courts in New York and Delaware. Since the number of courts with jurisdiction would go down, the danger of forum selling would also be reduced.

VI. INTERNATIONAL ISSUES

The framework developed in this paper also yields insights into international issues relating to jurisdiction. Although there are many potential international issues, this section will focus on two: jurisdiction in the U.S. when at least one party is a U.S. citizen and jurisdictional rules for litigation in foreign courts.

A. JURISDICTION IN THE U.S. WHEN ONE PARTY IS A U.S. CITIZEN

Courts and commentators are sometimes particularly concerned that restrictive jurisdictional rules will require U.S. citizens to sue in foreign countries. For example, Justice Ginsburg in *McIntyre* was particularly concerned that Kennedy's restrictive view of stream of commerce jurisdiction would require U.S. citizens to sue abroad if harmed by products manufactured overseas. Using the framework of this paper, she could be concerned about two effects: (1) that it would cost too much to litigate overseas or (2) that courts in foreign countries would be biased in favor of the non-U.S. defendant.

Concern over litigation costs is intuitive, but not clearly correct. Many lawyers I spoke to said that while travel was a significant expense in foreign litigation, the cost of travel was often more than offset by the fact that lawyers and litigation are usually much cheaper overseas. On the other hand, even though litigation overseas is often cheaper, many countries ban contingent fees. As a result, American plaintiffs might be deterred from suing, if they lacked access to litigation financing or were risk averse.

Bias is also a serious concern. Consider, for example, a U.S. citizen harmed by a product manufactured in China by a company with strong ties to the government. If jurisdictional rules required the U.S. consumer to sue in China, as Kennedy's opinion in *McIntyre* would suggest, then it seems unlikely that the American plaintiff would get a fair trial. Market constraints are, of course, possible. American consumers might anticipate unfair treatment and take that into

Electronic copy available at: https://ssrn.com/abstract=2422524

account when deciding between goods produced in China and goods produced in the U.S. or in other countries with fairer legal systems. If many consumers stopped buying Chinese goods, Chinese political and legal actors might work to improve their courts in order to sell more goods in the U.S. Or, if Chinese political and legal actors anticipated such consumer behavior, they might improve their courts even before American consumers had stopped buying Chinese goods. Nevertheless, the realism of these optimistic assumptions about consumer behavior and the responsiveness of Chinese political and legal actors is unclear.

If one doubts that Chinese courts would have an incentive to be fair or would act on those incentives, then it would make sense to provide jurisdiction in American courts. Of course, American courts might have an incentive to be too pro-plaintiff in order to favor U.S. consumers. On the other hand, Chinese companies could raise prices in the U.S. to offset the higher cost of doing business here, and U.S. politicians, judges, and juries might take that price effect into account in deciding whether to be biased. The effectiveness of this market constraint depends, in part, on the ability of Chinese companies to price discriminate. If there is an active resale market and prices were much lower in Mexico or Canada than in the U.S., then the higher U.S. prices might be undercut by resellers importing Chinese goods through Mexico or Canada.

A. Jurisdictional Rules for Non-US Courts

The analysis in this paper is also largely applicable to courts outside the United States. The two concerns that dominate this paper – litigation costs and bias – are equally relevant to non-U.S. courts. Nevertheless, some of the conclusions may differ, because of the different institutional context. Two constitutional provisions – The Due Process Clause and the Full Faith and Credit Clause – play an important role is U.S. courts, but would obviously be irrelevant outside the United States.

As discussed above, the Due Process Clause of the Fourteenth Amendment constrains the ability of U.S. courts to be unfair toward out-of-state litigants. While I argued above that this constraint is not very strong, it does put an outer bound on biased adjudication. Since there is no world constitution or world supreme court to enforce a similar constraint on the courts of various nations, there is no similar constitutional constraint on the extent of bias in foreign courts. For example, one might expect that courts in Iran, North Korea, or Venezuela would be quite biased against American litigants. Because of the absence of due-process like constraints, concerns about bias rules assume greater importance in the international context.

The absence of a Full Faith and Credit Clause in international litigation means that there is no guarantee that a judgment entered in one country will be enforceable in another. There are some treaties that address this question, and many countries enforce most foreign judgments as a matter of comity, but there is no general obligation to do so. Given the absence of constitutional constraints, the ability of courts to decline to enforce foreign judgments may provide an important check on biased or inconvenient litigation.

Electronic copy available at: https://ssrn.com/abstract=2422524

A universally accepted reason to decline to enforce a foreign judgment is that the court rendering judgment did not have jurisdiction. Given the danger of bias in foreign judgments, the relevant question should not be just whether the law of the forum state authorized jurisdiction, but whether the jurisdictional rules of the forum state are such that they reduce the danger of bias to tolerably low levels. This would lead to internationalization of the purposeful availment analysis discussed in Section III.

An alternative widely-accepted reason to decline to enforce a foreign judgment is evidence that the forum state's courts do not have impartial tribunals or fair procedures. This analysis is similar to the Due Process analysis discussed in Section III, and, like that analysis, it is likely to provide a relatively weak outer bound on the extent of foreign court bias. Determining bias on a case-by-case basis is very difficult unless the bias is blatant. Determining bias as a general matter would require statistical evidence of the kind that courts generally don't have and often don't consider even when presented. In addition, generally denying enforcement of judgments from particular countries could cause diplomatic problems. Denying enforcement when the jurisdictional rules provide no incentive for the forum to have fair rules may be a more practical way of enforcing fairness constraints.

An alternative way to think about the enforcement of foreign judgments is to ask which judgments it would be rational for states to enforce. As a preliminary matter, one might ask why a state would enforce a judgment against one of its citizens at all. Enforcement would seem to harm local residents for the benefit of foreigners. Nevertheless, this analysis is much too simple and ignores the ex ante consequences of enforcement. Potential foreign transactors will be reluctant to loan money or enter into contracts if they have no right to enforce judgments in the forum where their debtor's or contracting partner's assets are most likely to be located. Thus states have a reason to enforce foreign judgments in contractual situations.

Enforcement of tort awards requires different arguments. For torts, the most plausible rationale for enforcement is that it could reduce overall litigation costs and bias. For example, if a citizen of State A causes harm in State B and most of the witnesses are in State B, it may be cheaper to adjudicate the problem in State B, and then enforce the judgment in State A. Similarly, cases may arise where it is cheaper to litigate the case in State A and enforce the judgment in State B. This rationale may help to explain why some nations condition enforcement of foreign judgments on reciprocity. That is, courts in country A will enforce judgments rendered by the courts of Country B only if the courts of Country B would enforce judgments from country A. If Country A enforced Country B's judgments when litigation was cheaper in Country B, but Country B did not enforce Country A's judgments when litigation was cheaper in Country A, Country A's policy would reduce overall litigation costs, but could increase the litigation costs borne by A's citizens. On the other hand, if both countries enforced each other's judgments citizens of both A and B could benefit. Similarly, it would be in the mutual best interest of states to locate adjudication in the state with the greatest incentive to

Electronic copy available at: https://ssrn.com/abstract=2422524

constrain its adjudicators' biases, for example, by both enforcing a purposeful availment requirement.

Considerations such as these suggest that analysis of jurisdictional issues in foreign courts should be broadly similar to that in the United States, with perhaps more emphasis on bias. Because the danger of bias is likely to be larger in the international context, the best rule is probably purposeful availment, which gives national courts an incentive to adjudicate fairly disputes involving foreign parties.

VII. MULTI-PARTY LITIGATION

So far, this article has focused on simple suits involving a single plaintiff and a single defendant. Although multi-party litigation raises complex jurisdictional issues, for the most part those issues can be analyzed using the litigation cost/bias framework developed in this article. As discussed in greater detail below, the main difference in the analysis of multi-party litigation is that plaintiff choice of forum in class actions can lead to "reverse auctions." Unlike forum shopping in individual cases, which leads to a pro-plaintiff bias, reverse auctions introduce a pro-defendant bias. Thus, the analysis of jurisdiction in class action cases reinforces the problematic nature of jurisdictional rules that give plaintiffs substantial choice of forum and suggests that such rules can, in some circumstances, harm plaintiffs.

Consider first non-class actions involving multiple plaintiffs. Suppose, for example, that a manufacturer incorporated in New York and conducting all its management, design and manufacturing there sells products directly to retailers in all fifty states. If a Massachusetts resident and a California resident purchase defective products in their respective states and if the manufacturer has no contacts with those states other than marketing its products there, can the California and Massachusetts plaintiff sue jointly in California state court? There is little doubt that the California consumer could sue in California and that the Massachusetts consumer could sue in Massachusetts. Similarly, there is little doubt that, if the claims were brought separately, the California consumer could not sue in Massachusetts and the Massachusetts consumer could not sue in California. Nevertheless, some courts and commentators suggest that there should be a doctrine of "pendant personal jurisdiction" that grants jurisdiction if the two plaintiffs sue jointly in Massachusetts or California.[46] The litigation costs savings of such jurisdiction are clear, because it is cheaper to litigate the issue of defect once rather than twice. On the other hand, there is also a danger of the pro-plaintiff bias.

That pendant personal jurisdiction may induce a pro-plaintiff bias is relatively clear. If pendant personal jurisdiction is allowed in the example in the prior paragraph, joining the two claims together means that the plaintiffs can choose to file either in Massachusetts or California.

[46] Linda Sandstrom Simard, *Exploring the Limits of Personal Jurisdiction*, 62 OHIO ST. L. J. 1619 (2001); Apostolou v. Bracken, 2009 Westlaw 1312927 (D.N.J. 2009). See also articles in the next footnote discussing pendant personal jurisdiction in the class action context.

Electronic copy available at: https://ssrn.com/abstract=2422524

That means that plaintiff's lawyer can forum shop, so one of those two states might aim to attract litigation by making its adjudication more plaintiff friendly. While the danger of forum selling is relatively low when only two states are involved, pendant personal jurisdiction is not limited to such situations. For example, in the hypothetical discussed in the prior paragraph, if the product was marketed by the manufacturer to consumers in all fifty states, a sophisticated plaintiff's lawyer could file suit on behalf of her client in any state simply by joining a plaintiff who resides and purchased the product in the desired forum. That is, in many situations, pendant personal jurisdiction gives the plaintiff complete choice of forum, and, as discussed above, that means there is a significant danger of forum selling and a pro-plaintiff bias. While most states have little interest in attracting litigation, one rogue state can have disproportionate effect and distort the law for the whole nation.

The same tradeoff between possible litigation cost savings and potential pro-plaintiff bias emerges in the class action context. For example, if personal jurisdiction were based solely on the named plaintiff's claim, as pendant personal jurisdiction would allow, a sophisticated plaintiff's attorney could sue in any state merely by choosing a representative from that state.[47] For example, consider a variation on the situation discussed above. Suppose a manufacturer was incorporated in New York and conducted all its management, design, and production activities in New York, and sells its product directly to retailers in every state. If each plaintiff sued separately, she would be restricted to suing either in New York (where the manufacturer would be subject to general jurisdiction) or wherever the plaintiff bought the product. Nevertheless, under the doctrine of pendant personal jurisdiction, if the plaintiff brought a class action with a named plaintiff from State X, State X's courts would have jurisdiction over the entire class. The court would clearly have jurisdiction over the named plaintiff's claim, and pendant personal jurisdiction would give the court jurisdiction over similar claims by plaintiffs from other states.

Critics allege that plaintiffs lawyers exploited pendant personal jurisdiction to bring national suits in a small number of jurisdictions that were known to be particularly plaintiff friendly.[48] Those jurisdiction were known as "magnet" jurisdictions, "magic" jurisdictions, or "judicial hellholes."[49] Complaints about such litigation were a primary motive for the enactment of the Class Action Fairness Act (CAFA) in 2005, which allowed defendants to remove most class actions to federal court, even if the complete diversity requirement was not met.[50] Unfortunately, there has been little rigorous empirical work documenting the extent of abuses before 2005 or whether CAFA has been successful in curing the pro-plaintiff bias. As the

[47] Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L. J. 597, 612-18 (1987); Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate about 'Class Action Fairness,'* 58 SMU. L. REV. 1313 (2005); 2 NEWBERG ON CLASS ACTIONS § 6.26 (5th ed. 2012).

[48] See, e.g., Joseph H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It … In State Court*, 25 HARV. J. L. & PUB. POL'Y 143 (2001);

[49] Peter J. Boyer, *The Bribe*, THE NEW YORKER (May 19, 2008).

[50] 28 U.S.C. § 1332(d); S. Rep. No. 109-14 at 13 (2005).

Electronic copy available at: https://ssrn.com/abstract=2422524

example of patent litigation in the Eastern District of Texas, discussed above, shows, federal jurisdiction does not necessarily prevent forum shopping, forum selling, or the pro-plaintiff bias.

In addition to the pro-plaintiff bias, rules, such as pendant personal jurisdiction, that give plaintiffs' lawyers choice of forum introduce a unique problem for class actions: reverse auctions.[51] Consider again a class action against a manufacturer based in New York. One law firm (or coalition of law firms) might file a class action in California. Nevertheless, the mere filing of a case (unlike a judgment) does not prevent a different law firm from filing a similar or identical case in another state, perhaps Massachusetts. There might even before a fourth or fifth suit in other states. Nevertheless, if the defendant successfully negotiates a settlement with one of the law firms, that settlement will have preclusive effect and terminate litigation in the other states. If litigation in other states is terminated, the lawyers who brought those class actions will get no compensation. Thus, each law firm has an incentive to negotiate a settlement with the defendant so that it is the law firm that gets attorneys fees. As a result, the defendant can pit the plaintiffs' lawyers against each other and conclude a settlement with the law firm that is willing to settle on the terms most favorable to the defendant. This process is known as a "reverse auction," because unlike a typical auction, which causes buyers to bid higher and higher prices, plaintiff class action lawyers compete to offer the lowest price (settlement amount). This introduces a substantial pro-defendant bias, because defendants can use the reverse auction to settle for low amounts.

When class actions are filed in federal court, reverse auctions can be avoided by transferring or consolidated related cases. As a result, CAFA, has reduced the problem. Nevertheless, it has not eliminated it for two reasons. First, CAFA does not require class actions to be brought in federal court nor does it require defendants to remove such cases. If plaintiffs' lawyers bring their cases in state court, defense lawyers might strategically decide not to remove the cases in order to conduct a reverse auction. That is, even though defendants generally view state courts as more pro-plaintiff than federal court, the prospect of a reverse auction may induce some defendants to think they will do better in state court and therefore not remove. Second, CAFA does not apply to state-law claims that relate to "internal affairs or governance of a corporation."[52]

The exclusion of corporate governance suits from CAFA and the analysis in this section more generally helps to explain the lively debate currently under way about multi-jurisdictional corporate litigation.[53] While, until recently, corporate governance issues have been litigated in Delaware state courts (because most big corporations are incorporated there), there has recently

[51] John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354-55, 1370-73 (1995); MANUAL FOR COMPLEX LITIGATION, FOURTH, § 21.61.

[52] 28 U.S.C. § 1332(d)(8).

[53] See articles cited in the next four footnotes.

Electronic copy available at: https://ssrn.com/abstract=2422524

been a rise in the incidence of corporate litigation in other places.[54] This phenomenon has been criticized as undermining the efficiency of corporate governance, because courts outside Delaware are unlikely to have the same expertise in applying Delaware law as Delaware courts. In addition, defendants have sometimes been able to exploit the reverse auction to negotiate very low settlements, which may undermine the deterrent effect of Delaware law. For the purposes of this article, the key thing to note is that the problem arises from jurisdictional rules that give plaintiffs' lawyers the ability to sue in at least two places – where the corporation is incorporated, where it is headquartered, and perhaps elsewhere. If corporate governance disputes had to be litigated in a single place (e.g. the state of incorporation, and thus usually Delaware state court), the possibility of multi-jurisdictional litigation would disappear and with it the danger of reverse auctions and non-expert application of Delaware law. Even if multiple law firms filed class action suits in the same state, that state's judges would have the power to consolidate the cases. That the problem is caused by loose jurisdictional rules is well understood by participants in the debate, who realize that the remedy is to confine corporate governance disputes to courts in the state of incorporation. For example, Leo Strine, Chancellor of the Delaware Court of Chancery, has argued that "where lawsuits are filed contemporaneously in parallel forums, the courts should give effect to the parties' expressed choice of law -- ….. the law of the chosen state of incorporation – by applying a rebuttable presumption that litigation should proceed in the courts of that state."[55] That is, he advocates for a presumption that Delaware courts should have exclusive jurisdiction over corporate governance suits involving Delaware corporations. Another remedy is for corporations to put choice-of-forum clauses in their charters or bylaws.[56]

The reverse auction problem could also be solved if judges scrutinized settlements closely and refused to approve settlements that provided less relief for the class than would have been obtained if the case had been pursued vigorously without a reverse auction.[57] Unfortunately, judges seldom have the information necessary to evaluate whether the settlement amount is reasonable. Both parties to the settlement will argue that it is fair. Only when there are objectors is there likely to be information undermining the fairness of the settlement. In addition, most judges lack the incentive to scrutinize settlements carefully, because settlements clear their dockets whereas rejecting settlements means more work. The record of judges, especially state court judges, in approving coupon settlements of dubious value suggests that it is not wise to rely on judges to scrutinize settlements and thus to prevent reverse auctions.

---

[54] John Armour, Bernard Black, & Brian Cheffins, *Is Delaware Losing its Cases?* 9 J. EMPIRICAL LEGAL STUD. 605 (2012).

[55] Leo E. Strine, Lawrence A. Hamermesh, & Matthew Jennejohn, *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1, 4 (2013)

[56] Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 69 BUS. LAW. 325 (2013).

[57] Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1083-86 (2013).

Electronic copy available at: https://ssrn.com/abstract=2422524

So far this section has consider suits with a single defendant and multiple plaintiffs or a class of plaintiffs. Suits with multiple defendants or a defendant class raise similar issues. Litigation costs could be reduced by allowing such claims to be heard in a single forum. On the other hand, doing so may give plaintiffs choice of forum and thus raise the danger of forum selling. Allowing such claims to be heard in a single forum may also give rise to the pro-plaintiff bias.

To see how forum selling might occur, suppose plaintiff has claims against two defendants, Defendant 1 (for whom jurisdiction would be proper only in State X, if the plaintiff sued only Defendant 1) and Defendant 2 (for whom jurisdiction would be proper only in State Y, if plaintiff sued only Defendant2). If, on account of judicial efficiency, the plaintiff were allowed to sue both defendants in State X or both defendants in State Y, the plaintiff would essentially be given choice of forum and the dangers of forum shopping and forum selling would ensue. The danger would be particularly acute if there were defendants in more than two states. Consider the extreme situation, where there were defendants in every state. If jurisdiction against one defendant could be justified based on the contacts of a co-defendant, then the plaintiff would be able to choose to sue in any state. Identical issues are raised by class actions involving a defendant class, if jurisdiction could be based on the claim against the named defendant.

To see how the pro-resident bias may occur, suppose that a California consumer purchased a two bottles of same drug, one in California from a company based in Michigan and the other in Massachusetts from a company based in Massachusetts that sells only in Massachusetts. If the drug turned out to be defective, and the consumer sued in California, the California courts would have reason to be fair to the Michigan company, because, if the California courts are biased, the Michigan company could raise prices in California. On the other hand, the California courts would have no similar reason to be fair in their adjudication of the claim against the Massachusetts seller, because the seller would lack the ability to raise prices in California. If California courts were constrained to treat the two companies equally, then concern for prices in California might cause the courts to treat the Massachusetts company fairly, although it is also possible that the prospect of redistribution from the Massachusetts company would cause the courts to treat the Michigan company unfairly.

VIII. SOVEREIGNTY AND FAIRNESS

For more than a half century, judges and commentators have debated whether the minimum contacts test for personal jurisdiction is best justified by arguments about state sovereignty or individual fairness. Nearly all agree that the minimum contacts requirement is constitutionally grounded in the Due Process Clause, but there is little agreement as to why personal jurisdiction is of due process concern.

Electronic copy available at: https://ssrn.com/abstract=2422524

In the personal jurisdiction context, individual fairness is usually understood to mean preventing substantial hardship or inconvenience to defendants. It is easy to see how that could be a due process concern, because compulsory court appearance is a deprivation of liberty and the expense of litigating out-of-state could be a deprivation of property. Nevertheless, this interpretation is hard to reconcile with personal jurisdiction doctrine's emphasis on state lines. As noted above, it might be cheaper and more convenient for a New York City party to litigate in northern New Jersey than in upstate New York.

The sovereignty or federalism argument for restraints on personal jurisdiction emphasizes the need to limit one state's jurisdiction in order to preserve and respect the power of other states. This argument makes sense of personal jurisdiction doctrine's emphasis on state borders, but, as has often been pointed out, federalism and sovereignty are not usually interests protected by the Due Process Clause. In addition, if personal jurisdiction doctrine protects the interests of states, why can individuals waive personal jurisdiction issues?

This article's arguments about bias against out-of-state parties shows the connection between individual fairness, federalism, and sovereignty. States can ordinarily be expected to deal fairly with their own citizens, because state citizens ultimately control their state governments. Similarly, states can be expected to deal fairly with out-of-state individuals and corporations that do business in the state, because state citizens benefit from the activity of those out-of-state parties. State legislators and courts know that if out-of-state entities are treated unfairly, those entities can leave the state. For this reason, it is fair for a state to assert jurisdiction over parties who have purposefully availed themselves of the benefits of the forum state. Nevertheless, a state has little reason to be fair to those who are neither citizens nor do business in the state. While many judges and jurors would presumably treat such parties fairly as a matter of principle, there is both anecdotal and empirical evidence supporting the idea that at least some judges and jurors consciously or unconsciously act in in biased ways. Limiting the ability of state courts to assert jurisdiction over those who have not purposefully availed themselves of the forum state is thus a plausible way of preventing unfairness. That is, carefully defining the sovereignty of states can help ensure individual fairness to out-of-state litigants who might otherwise be subjected to biased adjudication.

IX. RANDOMIZATION

So far this article has focused on a few jurisdictional rules. There are, of course, an infinite variety of possible jurisdictional rules. This section will discuss two additional rules. Both involve an element of randomization. As a result, they offend traditional notions of due process and sovereignty and are not likely to be implemented. Nevertheless, they help illustrate the issues relevant to design of a good jurisdictional rule. Consider the following possible rules:

> **Randomization among unrelated low-cost fora.** The forum is randomly chosen from among all states where lawyer costs are below average, excluding states where the

Electronic copy available at: https://ssrn.com/abstract=2422524

plaintiff is resident or the defendant is headquartered or incorporated. Some geographical limitations – such as exclusion of Hawaii and Alaska, or preference for states located near the plaintiff's residence or defendants' headquarters – might be part of this rule.

Randomization between plaintiff's residence and defendant's headquarters. The forum is, with fifty-percent probability, the state where the plaintiff resides, and, with fifty-percent probability, the state where the defendant is headquartered.

A. Randomization among unrelated low-cost fora

It is usually assumed that the forum should have some relationship to the dispute. That is, most jurisdictional rules currently or historically in force or discussed in academic commentary select a forum that is either the plaintiff's residence, the defendant's headquarters or incorporation state, where the accident occurred, where the contract was breached, or a state with some other connection to the dispute. Nevertheless, unrelated fora could both reduce litigation costs and reduced bias.

When I spoke to lawyers, they universally said the main reason location mattered for litigation costs was that lawyers were cheaper in some jurisdictions than others. In general, lawyers in big cities, such as Los Angeles or New York, are much pricier than lawyers in smaller cities, such as Omaha or Tallahassee. This fact suggests that the cost-minimizing personal jurisdiction rule might be to randomly assign litigation to a low-cost forum, even if neither the plaintiff nor the defendant has a relationship with the forum. Such a forum might, of course, land up being more expensive, perhaps because the lawyers expend considerable time and money traveling to depose witness. In addition, if there were a trial, the parties and witnesses would probably have to travel to the forum, which would add significantly to the expense. On the other hand, since trials occur in less than five percent of cases, the additional expense of trial has only a modest effect on overall litigation costs.

Litigating in a randomly chosen low-cost forum could also reduce bias if plaintiff's residence and defendant's headquarters were excluded from possible fora. As discussed above, states that have connections to the dispute also usually have reasons to be biased in favor of one of the parties. Locating litigation in an unrelated forum may, therefore, be a good way to secure a truly unbiased forum. So for example, in a dispute between a California plaintiff and a Delaware defendant, selecting Montana, Nebraska or Florida as the forum might produce less bias than litigating in either California or Delaware, because judges and jurors in Montana, Nebraska or Florida would have no reason to favor one side or the other. Similarly, when legislators or judges fashion procedural or substantive rules, the presence of litigation exclusively involving outsiders would give them incentives to favor neither plaintiffs nor defendants.

In order to prevent a surge of litigation in the lowest-cost forum and in order to prevent the pro-plaintiff bias that plaintiff choice among unrelated fora might induce, the unrelated forum would need to be chosen by some random method. Perhaps states could cooperate and set up a

Electronic copy available at: https://ssrn.com/abstract=2422524

mechanism by which plaintiffs would initially file a preliminary version of their complaint in a case assignment facility, which would then randomly assign a low-cost forum that was neither the plaintiff's residence nor the defendant's headquarters. Such a facility could also be restricted to choosing a forum that was not extremely inconvenient (e.g. Alaska or Hawaii).

While an unrelated forum would help prevent biased adjudication, it would potentially introduce other problems. Would judges and jurors be willing to put sufficient effort into resolving such cases? Perhaps judges would prioritize cases involving purely local disputes, while dealing hastily with disputes involving outsiders. The judicial system usually relies on political constraints, such as reelection or impeachment, to give judges at least some incentive to discharge their duties responsibly. Social pressure from the local community also provides some incentive for diligent judging. Where neither party has any connection to the forum, these incentives are unlikely to operate. Only the judge's professional pride and sense of justice are likely to provide inducements to exert effort. In addition, an unrelated court might refuse to hear the case at all. While there are some cases that have suggested that state courts sometimes have an obligation to provide a forum for litigation involving non-residents, it is doubtful that courts have an obligation to hear cases where neither a party nor an issue is in any way related to the state. States might increase their court fees for cases having no relation to the forum to cover their costs, although fees that explicitly discriminated in that way would raise other constitutional issues.

Another problem with a randomly selected unrelated forum is unpredictability. The degree to which this is a problem is affected by choice-of-law rules. If the states could agree on a single forum-neutral choice of law rule and apply it impartially, then randomness in jurisdiction would not change the rules guiding primary behavior. On the other hand, to the extent that each state has its own choice of law rules and such rules are applied in a non-uniform way (for example, by favoring the law of the forum), then randomness in jurisdiction could lead to significant problems. Nevertheless, in some fields, such as product liability, defendants cannot ordinarily tailor their products to particular markets, so unpredictability of the law in individual cases doesn't matter. As David Rosenberg has argued, in such situations, even when the forum is predictable, manufacturers must plan their actions based on "average law."[58] The problem of unpredictability could be reduced or eliminated by choosing the random forum ex ante. For example, jurisdiction for all litigation involving a California defendant and an out-of-state plaintiff could take place in Arizona, while all litigation involving a New York defendant and out-of-state plaintiff could take place in Ohio.

If litigation in an unrelated low-cost forum were truly advantageous, one might expect contracting parties to use choice-of-forum clauses to select such fora. The fact that parties do not seem to draft such clauses would therefore be evidence that such fora do not have the advantages

[58] David Rosenberg, *A Solution to the Choice-of-Law Problem of Differing State Laws in Class Actions: Average Law*, 79 GEO. WASH. L. REV. (2011).

Electronic copy available at: https://ssrn.com/abstract=2422524

suggested here. On the other hand, to the extent that lawyers think that the unrelated forum would refuse to hear the case, the non-use of such clauses provides no evidence about the desirability of litigating in unrelated low-cost fora.

B. Randomization between plaintiff's residence and defendant's headquarters

Random assignment of cases to either the plaintiff's residence or defendant's headquarters would ensure low litigation costs, eliminate forum selling, and, under some circumstances, remove the incentive of legislators and judges to craft biased rules. Suppose for example that there only two states, A and B, and cases are distributed as follows:

Table 3. An Example Where Randomization Could Help

		Defendant	
		State A	State B
Plaintiff	State A	90	10
	State B	10	90

That is, most cases involve person suing another person from the same state, but there are an equal number of cases involving State A plaintiffs suing State B defendants and State B plaintiffs suing State A defendants. If the rule is that a plaintiff always sues in her own state, then 100% of cases will involve an in-state plaintiff (A v A and A v B in Court A; B v B and B v A in Court B), while only 90% of cases will have an in-state defendant (A v A in Court A and B v B in Court B). This gives legislators and courts an incentive to craft pro-plaintiff rules, because such rules could redistribute wealth from out-of-state defendants. Conversely, if the rule is that the plaintiff always sues in the defendant's state, then 100% of cases will involve an in-state defendant, while only 90% will involve an in-state plaintiff. This gives legislators an incentive to craft pro-defendant rules, because such rules would prevent wealth from flowing to out-of-state residents. If, however, the cases with diverse parties are randomly assigned to State A or State B's courts, then 95% of the cases will involve an in-state plaintiff (A v A and half of A v B in Court A; B v B and half of B v A in Court B) and 95% will involve an in-state defendant (A v A and half of B v A in Court A; B v B and half of A v B in Court B). Thus, with randomization, state legislators and defendants have an incentive to craft unbiased rules, because, in addition to the efficiency benefits of such rules, there would be no redistributive benefit from pro-plaintiff or pro-defendant rules.

Nevertheless, randomization will not always ensure fair law. First, the incentive to create unbiased rules exists only when the states are symmetric, that is, where there are equal numbers of A v B and B v A cases. This might make sense for states with similar economies, but not universally. For example, suppose State A is primarily agricultural, while State B is largely industrial. Agricultural products seldom result in litigation, but industrial products sometimes generate product liability suits. As a result, there are likely to be more A v B suits than B v A

Electronic copy available at: https://ssrn.com/abstract=2422524

suits. No matter how these suits are allocated, at least one of the states will have an incentive to create biased rules.

In addition, randomization only reduces the incentive to have biased rules. It does not reduce the incentive for states to have biased adjudication. States might adopt rules that were efficient and unbiased, but then apply them in a way that discriminated against outsiders. For example, jurors in State A might impose higher damages when the plaintiff was from A and the defendant from B.

Finally, whatever its effects on bias, randomization makes it difficult for parties to plan their primary conduct. As noted above, this concern is most serious when choice of law is not uniform, so that the rules governing primary conduct may vary depending on the forum which will not be known in advance. Nevertheless, if randomization could be done ex ante, predictability might not suffer as much. For example, all potential defendants (individuals, corporations, etc.) could be with fifty-percent probability to one of two groups: always litigate at home, or always litigate out-of-state when plaintiff is from out-of-state.

X. CONCLUSION

The table below summarizes litigation cost and bias attributes of the principal rules discussed in this paper.

Electronic copy available at: https://ssrn.com/abstract=2422524

Table 4. Comparison of Rules

	Litigation Costs		Bias	
Personal jurisdiction rule	Cost of adjudicating merits	Cost of determining jurisdiction	Pro-plaintiff bias (Forum selling) or pro-defendant bias (reverse auction)	Pro-Resident Bias
Plaintiff's choice	Bad	Best	Worst	OK
Plaintiff's residence	Good	Best	Best	Worst
Defendant's headquarters	Good	Best	Best	Worst
Purposeful availment	OK	OK	Good	Good
Lowest cost	Best	Bad	Ok	Bad
Expanded diversity jurisdiction + plaintiff residence or defendant headquarters personal jurisdiction rule	Good	Best	Best	Best
Targeted diversity jurisdiction + plaintiff residence or defendant headquarters personal jurisdiction rule	Good	OK	Best	Very good

Unfortunately, there is no rule that performs best on all dimensions of litigation cost and bias. The expansion of diversity jurisdiction through elimination of the complete diversity rule in conjunction with personal jurisdiction in either the plaintiff's residence or defendant headquarters' state holds out the promise of low litigation costs and low bias. On the other hand, it would require a substantial expansion of the federal judiciary which could compromise the quality of adjudication in federal court.

There is often a trade-off between minimizing litigation cost and minimizing bias. As a result, the choice of the optimal jurisdictional rule depends on how large the litigation cost and bias effects are. If jurisdictional rules have a large effect on litigation costs, but only a negligible effect on the pro-resident bias, then jurisdiction in the state where the plaintiff resides or defendant is headquartered would be optimal. Similarly, if forum selling and reverse auctions are

Electronic copy available at: https://ssrn.com/abstract=2422524

significant dangers, but the pro-resident bias is not much affected by jurisdictional rules, then allowing the plaintiff to sue where she resides or where the defendant is headquartered would be a fine jurisdictional rule. Conversely, if jurisdictional rules have large effects on bias against out-of-state residents, but small effects on litigation costs, then purposeful availment or expanded or targeted diversity jurisdiction would be best. Finally, if personal jurisdiction has significant effects on neither litigation costs nor bias, then the rules do not much matter, and constitutional constraints on personal jurisdiction have little pragmatic justification. The best jurisdictional rule thus depends on empirical questions that have hardly begun to be asked.

Electronic copy available at: https://ssrn.com/abstract=2422524